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TRANSCRIPT OF RECORD

Joseph C.

Supreme Court of the United States

OCTOBER TERM, 1947

No. 75

MANDEVILLE ISLAND FARMS, INC., AND ROSCOE
C. ZUCKERMAN, PETITIONERS,

vs.

AMERICAN CRYSTAL SUGAR COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 23, 1947.

CERTIORARI GRANTED JUNE 2, 1947.

No. 11266

United States
Circuit Court of Appeals

For the Ninth Circuit.

MANDEVILLE ISLAND FARMS, INC., a corporation, and ROSCOE C. ZUCKERMAN,
Appellants,

VS.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Southern District of California, Central Division

No. 4643-BH

MANDEVILLE ISLAND FARMS, INC., a Cor-
poration, and **ROSCOE C. ZUCKERMAN,**
Plaintiffs,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a
Corporation,
Defendant.

**ACTION FOR AN ACCOUNTING, DAMAGES
UNDER THE ANTI-TRUST LAWS, ETC.**

Now comes plaintiffs above named and as a first
count herein allege:

I.

The grounds upon which the jurisdiction of the
court depends are: (a) Diversity of citizenship;
(b) this is an action brought by persons injured in
their business and property by reason of acts of
the defendant forbidden in the anti-trust laws of
the United States, (15 U.S.C. §15) and brought in
a district in which the defendant is found and has
an agent.

II.

(a) Plaintiff **Mandeville Island Farms, Inc.,**
now is and at all times herein mentioned has be-
come a corporation duly organized and existing
under and by virtue of the laws of and a citizen
and inhabitant of the State of California, with its

principal place of [2] business in Stockton, San Joaquin County, California.

(b) Defendant American Crystal Sugar Company now is and at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of and a citizen and inhabitant of the State of New Jersey, with its principal office and place of business in Denver, Colorado, and engaged in trade and commerce among the several states of the United States. At all times herein mentioned, said defendant has been and now is qualified to do and doing business in California and in the above entitled district thereof as a foreign corporation and is found in the above entitled district and division of California and in various other parts of California. Its agent designated for service of process under and by virtue of the law of the State of California regarding foreign corporations, is, J. W. Rooney of Oxnard, Ventura County, in the above entitled district and division of California.

(c) Plaintiff Roscoe C. Zuckerman now is and at all times herein mentioned has been a citizen and inhabitant of the State of California and a resident of San Joaquin County in said State.

III.

Plaintiffs Mandeville Island Farms, Inc., and Roscoe C. Zuckerman assert rights herein to relief in respect of or arising out of a series of transactions in which common questions of law and common questions of fact arise and are involved.

The said transactions involve agricultural contracts identical in practically all material matters and respects, for successive cropping seasons, each involving sugar beets to be grown and grown on Mandeville Island which is a tract of land located in California north of the 36th parallel. A sugar crop season or year as referred to herein is from August 1st of any particular year to July 31 of the next calendar year and is commonly referred to herein by the year number of the calendar year in which it commences. [3]

IV.

The matter in controversy herein exceeds, exclusive of interest, costs, and attorney fees, the sum of \$3,000.00.

V.

(a) During the crop seasons 1938 to 1942, both inclusive, large acreages of agricultural land in California north of the 36th parallel were planted to sugar beets. Said sugar beets, when harvested, were not sold in central markets as were potatoes, onions, corn, grain, fruit and berries, but were produced by growers under contract with manufacturers or processors and immediately upon being harvested were delivered to these manufacturers and taken to their beet sugar refineries where the sugar beets were manufactured by an elaborate process into raw sugar by the said manufacturers, who thereafter sold the resulting sugar in interstate commerce. Said sugar beets, when harvested, were bulky and semi-perishable and incapable of being transported over long distances or of being

stored cheaply or safely for any extended period. Said sugar beets, when ripe, deteriorated rapidly if kept in the ground and not harvested, and it was necessary to harvest them promptly when matured.

(b) The only practical market available to growers of sugar beets in California north of the 36th parallel during said period was sale to one of the three manufacturers that operated one or more beet sugar refineries in said district. Defendant was one of said three manufacturers. The initial outlay for the construction of a beet sugar refinery was so great, the annual upkeep and operating expenses were so large, and the time involved in erecting and equipping a beet sugar refinery so long that no competition from any new refinery could be expected within a period of time shorter than two years, even if the necessary material and equipment priorities could be secured. During all of said period, said three manufacturers of sugar beets had a complete monopoly in the manufacture of sugar beets into sugar in California north of the 36th parallel and owned and [4] controlled all sugar beet factories in said area of California which manufactured sugar beets into sugar, and no grower of sugar beets in California north of the 36th parallel could, during any part of said period, sell sugar beets at a profit except to one of said manufacturers. The sugar manufactured from said beets was, during all of said period, sold in interstate commerce throughout the United States.

VI.

During said period above referred to, the only method of sale of marketable sugar beets used by growers of sugar beets in said area was by sale to one of the said three manufacturers under standard form printed contracts prepared by the manufacturers whereby the price to be paid by the manufacturer to the grower of sugar beets was determined for beets of a given sugar content by the net price received from the sale in interstate commerce of the raw sugar manufactured from the sugar beets delivered by the various growers to the manufacturers.

VII.

In and by said standard contract, the grower agreed (a) to plant a specified acreage to sugar beets with seed furnished by the manufacturers to the grower at grower's cost, (b) to cultivate said land after the same had been planted and to care for and harvest the sugar beets, and (c) to deliver the beets so harvested to the manufacturer. The manufacturer agreed in and by said contract (a) to accept delivery of said sugar beets from the grower except that the manufacturer had the right to reject any beets that were diseased, wilted, or not suitable for the manufacture of sugar, (b) to manufacture into sugar the sugar beets accepted by it, (c) to sell the raw sugar so produced not later than August 31 of the next crop year, (d) to make on the 15th day of each month an advance payment for the sugar beets delivered during the preceding month, based on the estimate made by

the manufacturer of the sugar sold [5] and to be sold which had been manufactured from beets produced by the grower and other growers under like contracts, and (e) to make final settlement for all beets after the sugar manufactured from said beets had been sold in interstate commerce, but on or before August 31st of the next crop year, the price to be paid for said beets to be determined upon the sugar content of the beets of the individual grower and the net return received from the sale of the manufactured raw sugar in interstate commerce.

VIII.

Defendant and the other manufacturers of sugar referred to herein were at all times herein mentioned growers of sugar beets and "producers on the farm" of sugar beets and "processors of sugar beets" as those respective phrases are and were used in the Sugar Act of 1937. Plaintiff is informed and believes and upon such information alleges that each of said persons received payments for the crop years 1939, 1940, and 1941 from the Secretary of Agriculture in accordance with §301 of the said Sugar Act. (7 U.S.C. 1131). Claude R. Wickard was at all times mentioned in this paragraph the duly appointed, qualified and acting Secretary of Agriculture. On Dec. 2, 1940, said Secretary of Agriculture, after due notice to all interested parties (including defendant and all other manufacturers of sugar in California) and after public hearings duly held and after investigations duly made, did pursuant to §301d of said Sugar Act (7 U.S.C. 1131 (d)) made the following

determination of the fair and reasonable price for the 1940 and 1941 crops of sugar: (5 Fed. Reg. 5231):

"Fair and reasonable prices for the 1940 and 1941 crops of sugar beets. The requirements of subsection (d) of section 301 of the Sugar Act of 1937, as amended, shall be deemed to have been fulfilled with respect to the 1940 and 1941 California crops of sugar beets if the producer-processor shall have paid rates for any sugar beets processed by him equal to those provided in the following schedule: [6]

Percent sucrose in beets	Average net return per 100 lbs. of sugar				
	\$4.00	\$3.75	\$3.50	\$3.25	\$3.00
	Price per ton of sugar beets				
19.....	\$7.12	\$6.65	\$6.18	\$5.70	\$5.22
18.....	6.66	6.21	5.76	5.31	4.86
17.....	6.20	5.78	5.36	4.93	4.50
16.....	5.76	5.36	4.96	4.56	4.16
15.....	5.32	4.95	4.58	4.20	3.82
14.....	4.90	4.55	4.20	3.85	3.50

(Payments upon intermediate sugar prices and sugar content, or sugar prices or sugar content, higher or lower than those shown in the foregoing schedule, shall be on the same proportionate basis.)

Provided, however, that in no event shall the average net return used as the settlement basis be determined by averaging the net proceeds realized from the sale of sugar by more than one producer-processor: And provided further, that a haulage allowance at a rate not less than 2½ cents per mile per ton shall be granted to growers who perform

such service in areas in which allowances have been agreed upon between producer-processors and growers."

No appeal has been taken from said determination and any time to appeal has expired; it has not been modified, abrogated, cancelled, or withdrawn, but has become final. The fair and reasonable prices for sugar beets for the 1940 and 1941 California crops are as set forth in said determination.

IX.

Prior to the crop season of 1939 and subsequent to the crop season of 1941, the net return from the sale of manufactured raw sugar was determined by the net return from the sale of raw sugar manufactured in beet sugar factories of the particular contracting manufacturer from beets delivered to said manufacturer by the grower and other growers in the same area during the particular crop season, in accordance with the schedule set forth in the standard contract. [7] But during the crop seasons of 1939, 1940 and 1941, pursuant to the conspiracy hereinafter referred to, the standard printed contract as used by all of said manufacturers provided that the net return used as a basis for the prices to be paid the grower was the average net return of all manufacturers manufacturing sugar north of the 36th parallel in California and not the net return of the particular manufacturer with whom the grower contracted and to whom the beets were delivered and by whom the beets were manufactured into raw sugar.

X.

During the sugar beet crop year of 1938, the net gross receipts of sales of sugar, (less allowances, federal excise taxes, freight to destination, and cash discounts to customers) secured by defendant were 3.641 cents per pound while, at the same time, the like average net gross receipts from the other manufacturers of beet sugar in California north of the 36th parallel were 3.348 cents per pound, or .263 cents less than the net gross receipts secured by defendant. As a result thereof, during the crop year 1938, sugar beet growers in California north of the 36th parallel received on the average from 29½ cents to 52½ cents per ton more for sugar beets delivered to defendant corporation than did growers of identical beets of identical sugar content delivered to other manufacturers of beet sugar in California north of the 36th parallel.

XI.

Thereupon and some time in 1937 or 1938, at a time unknown to plaintiffs but particularly within the knowledge of defendant, said defendant illegally and wrongfully entered into a conspiracy with each and every one of the other manufacturers of sugar in California whose plants were located north of the 36th parallel to unlawfully monopolize and restrain trade and commerce in sugar and sugar beets among the several states and to unlawfully fix prices to be paid the growers of sugar beets, all in violation of the anti-trust [8] laws of the United States, and as a part of said unlawful conspiracy agreed

among themselves to do and did as follows during the crop years 1939, 1940, and 1941.

(a) Each no longer competed against any of the others as to the price to be paid the growers for sugar beets raised in California north of the 36th parallel.

(b) Each paid the same price to growers of sugar beets in California north of the 36th parallel and no more, to wit: the price determined upon the average net returns from the sale of raw sugar of all sugar manufactured in the plants of said conspirators north of the 36th parallel in California and did not pay the growers upon the net returns from the sale of sugar manufactured in California north of the 36th parallel by the particular manufacturer to whom the particular grower was under contract.

(c) Each no longer competed with any of the other manufacturers of sugar north of the 36th parallel as to efficiency of sales or manufacturing organizations, but instead, and regardless of the efficiency or lack of efficiency of the sales or manufacturing organization of any of the conspirators, and regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, paid all growers of sugar beets in California north of the 36th parallel, the same price for the same amount of beets of the same sugar content.

(d) Instead of paying the grower of sugar beets a reasonable price for their beets, each bought

beets only from growers who signed a standard printed form contract prepared by the said manufacturers and identical in all material terms. Growers either sold under said contract to one of said manufacturers or could not sell their marketable [9] beets to anyone except for hog or cattle feed at a large loss.

(e) Said standard contract for the crop years 1939, 1940, and 1941 provided that the price to be paid the grower of sugar beets in dollars and cents for beets containing 15%, 16%, 18% and 19% sugar (the percentages here involved) was as follows:

Net return received from sugar per cwt.		Amount to be paid to grower, per ton of beets			
		19%	18%	16%	15%
5 cents		8.74	8.28	7.28	6.72
4¾ "		8.33	7.89	6.94	6.41
4½ "		7.92	7.51	6.60	6.09
4¼ "		7.35	6.97	6.12	5.65
4 "		6.78	6.42	5.64	5.21
3¾ "		6.21	5.88	5.17	4.77
3½ "		5.72	5.42	4.76	4.40
3¼ "		5.21	5.03	4.42	4.08
3 "				3.77*	3.49*

* For the year 1940 only.

Said standard contract gave a schedule of net returns from sugar per 100 lbs. in one-fourth cent intervals and show the percentage of sugar content in one per cent intervals, including those above set forth, but the contract further provided that intermediate figures of net return from sugar 100 lbs. and intermediate percentages of sugar content were

to be figured pro rata. Inasmuch as beets of sugar content other than 15%, 16%, 18% and 19% are not herein involved, the schedules herein are limited to such percentages. Said prices agreed upon by defendant and its co-conspirators to be paid by them and paid by them to plaintiff and the [10] other growers of sugar beets in California north of the 36th parallel were not the reasonable prices for sugar beets. The reasonable prices for sugar beets for the crop years 1940 and 1941 were as determined by the secretary of Agriculture and set forth in par. VIII hereof.

XII.

Prior to the 1939 crop season, the various manufacturers of sugar in California north of the 36th parallel, including defendant, competed with each other as to the performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales return and decrease expenses and to operate as efficiently as possible and thus to increase the unit return to growers of sugar beets under said standard contract. But during said crop seasons of 1939, 1940 and 1941, as a direct, expected and planned result of said conspiracy, there was no longer any such competition. Plaintiffs are informed and believe and, upon such information and belief, allege that defendant, as a result of said conspiracy, did not during said crop seasons of 1939, 1940 and 1941, conduct its operations in as efficient and careful manner as it had prior thereto (when there was no conspiracy but was competition between itself and

the other manufacturers), or in as efficient or careful manner as it would have had said conspiracy not existed. As a result thereof, defendant received less in sales returns for its raw sugar and incurred more expense in its operations in said crop years than it would have had competition been free from and unrestrained by said conspiracy and plaintiffs did not receive the reasonable value of their sugar beets.

XIII.

As a direct, expected and planned result of said conspiracy, the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed, and, instead of defendant and [11] the other said manufacturers producing and selling raw sugar in interstate commerce with individual enterprise and sagacity, and in competition with each other as they had previously done, they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system which it was and is the purpose of the anti-trust acts to protect and which had existed prior to said conspiracy. As a further direct, expected and planned result of said conspiracy, any and all incentive that theretofore existed for defendant and the other said manufacturers to be efficient and economical and to develop individual enterprise and sagacity, disappeared, and, during said crop seasons, said three manufacturers operated, in so far as the growers were concerned, as if they were one corporation owning and controlling all sugar beet factories in California

h of the 36th parallel but with three completely
rate overheads and with none of the efficiency
consolidation into one corporation might bring.

XIV.

aid conspiracy continued throughout the crop
s of 1939, 1940 and 1941, and until August 31,
2, when the last payment was made under the
1 standard contract and said conspiracy has
n continued thereafter, up to the present time
o far as defendant and each of its co-conspira-
s still refuse and will not make payments to any
the growers other than in accordance with the
hod agreed upon in said conspiracy as above set
th.

XV.

The determination of the Secretary of Agricul-
e under the Sugar Act of 1937 as to the fair and
sonable prices for the 1940 and 1941 California
ops of sugar beets was made Dec. 21, 1940, and
s published on the Federal Register on Dec. 24,
40, as aforesaid, but, nevertheless, defendant and
said co-conspirators, each of whom took part in
e said hearings held by the Secretary of Agricul-
re, [12] and each of whom well knew of the de-
termination, persisted thereafter in their said con-
spiracy and would not buy beets from growers in
California north of the 36th parallel except under
e terms and conditions set forth in said standard
reement.

XVI.

On November 14, 1938, defendant and plaintiff

Mandeville Island Farms, Inc., entered into one of defendant's standard form contracts for the 1939 crop season under which defendant promised to pay said plaintiff on August 31, 1940, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1939 delivered to defendant 22,355.6 tons of sugar beets of an average sugar content of 18.25% from Mandeville Island, which beets were accepted by defendant and manufactured by it in sugar. Said plaintiff does not know when said sugar beets were manufactured into sugar by defendant. Said information is particularly within the knowledge of defendant. Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XVII.

On December 29, 1939, defendant and plaintiff Mandeville Island Farms, Inc., entered into one of defendant's standard form contracts for the 1940 crop season under which defendant promised to pay said plaintiff on August 31, 1941, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1940 delivered to defendant 25,430.3 tons of sugar beets of an average sugar content of 15.55% from said Mandeville Island, which beets were accepted by defendant and manufactured into sugar. Said plaintiff does not know

en said beets were manufactured into sugar by defendant. Said information is particularly within the knowledge of defendant. [13] Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XVIII.

On June 23, 1941, defendant and plaintiff Roscoe Zuckerman entered into one of defendant's standard form contracts for the 1941 crop season under which defendant promised to pay said plaintiff on August 31, 1942, for the sugar beets delivered hereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1941 delivered to defendant 14,144.7 tons of sugar beets of an average sugar content of 15.47% from said Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar. Said plaintiff does not know when said sugar beets were manufactured into sugar by defendant. Said information is particularly within the knowledge of defendant. Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XIX.

Defendant paid plaintiffs for their 1939, 1940 and 1941 crops of sugar beets on August 31 of 1940, 1941 and 1942, respectively, but in carrying out said conspiracy and as a part and parcel thereof, said defendant paid plaintiffs on said respective

dates, not upon the price secured in interstate commerce from sugar beets delivered by plaintiffs and other growers located north of the 36th parallel to the refineries of defendant located north of the 36th parallel, as defendant had paid growers prior to the 1939 crop year and not upon the prices and the bases determined by the Secretary of Agriculture to be fair and reasonable as aforesaid; but paid them in accordance with the average net return secured in interstate commerce by all manufacturers of beet sugar with refineries in California north of the 36th parallel and in accordance with the schedule set forth in the said standard contracts. Plaintiffs are informed and believe [14] and, upon such information and belief allege that the net sales return secured from sugar sold by defendant was greater than the average secured by all manufacturers of sugar north of the 36th parallel. Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, plaintiff Mandeville Island Farms, Inc., would have received at least \$105,014.60 more and plaintiff Roscoe C. Zuckerman would have received at least \$37,397.38 more than each did receive under said contracts and said plaintiffs, respectively, sustained damages accordingly, none of which damage has been paid. The exact amount that plaintiffs were damaged, as aforesaid, can only be determined by an accounting in that defendant has refused all requests and demands of plaintiffs

for information on which plaintiffs could determine and could herein plead the specific amounts due to plaintiffs. Plaintiffs are entitled by virtue of paragraph 15 of the anti-trust laws of the United States (15 U.S.C. Sec. 15) to have such damages trebled.

XX.

By reason of the foregoing acts of the defendant and its said co-conspirators, interstate commerce in sugar was illegally restrained, competition therein was not only substantially lessened but was destroyed, the price of sugar beets was illegally fixed, and an illegal monopoly was established, all in violation of the anti-trust laws of the United States to the damage of plaintiffs as aforesaid.

XXI.

Plaintiffs, in order to enforce their rights against defendant, employed the services of attorneys at law and, under the anti-trust laws of the United States (15 U.S.C. Sec. 15), are entitled to reasonable attorneys' fees, the amount of which will depend upon the amount of work necessary to be performed herein by said attorneys. [15]

XXII.

From October 10, 1942, to June 30, 1945, the statute of limitations applicable to the within set forth violations of the anti-trust laws of the United States was suspended by reason of the amendment of 16 U.S.C. Sec. 16, passed October 10, 1942 (Acts of Congress October 10, 1942, Ch. 589; 56 Stat. 781, U.S.C. 1940 ed., Sup. IV, p. 185; 15 U.S.C.A. 1944 Cum. An. P. P. Title 15, Sec. 16, p. 76), which was

20 *Mandeville Island Farms, Inc., et al.,*

in full force and effect between October 10, 1942 and June 30, 1945.

And As a Second Count, plaintiff Mandeville Island Farms, Inc., alleges:

XXIII.

The ground upon which the jurisdiction of the court depends is diversity of citizenship.

XXIV.

Plaintiff refers to Pars. II, III, IV, V, VI, VII, VIII, IX, X, & subpar. e of Par. XI hereof and incorporates the same herein by reference as though here set forth in full.

XXV.

Plaintiff refers to Par. XVII hereof and incorporates the same herein by reference as though here set forth in full.

XXVI.

Commencing the latter part of December, 1940, and continuing until March, 1941, the price of raw sugar increased in value by the amount of approximately 75c per 100 lbs. and remained at said higher prices or even still higher prices for many months thereafter. Said plaintiff Mandeville Island Farms, Inc. is informed and believes and, upon such information and belief, alleges that defendant, instead of selling said sugar at the higher prices that prevailed subsequent to April 1, 1941, retained most of it and sold it subsequent to August 31, 1941, at the high prices then prevailing. Defendant did not

account to nor pay said plaintiff the price provided [16] for in the contract for said sugar but, instead, defendant determined the price to be paid said plaintiff for said sugar, not upon the prices actually received for the sugar manufactured from sugar beets produced by plaintiff and other growers during the crop season of 1940 and delivered during said crop season under said standard form of contract but used the prices obtained for sugar sold from August 1, 1940 to August 31, 1941, regardless of when the sugar then sold was produced or manufactured. Said sales consisted mainly of sugar on hand and in storage August 1, 1940 and which was grown and delivered in previous crop seasons and which was sold by said defendant and the other manufacturers at the lower prices that prevailed from August 1, 1940 to December 31, 1940, instead of at the higher prices that prevailed when the 1940 sugar was actually sold. Said plaintiff is informed and believes and, upon such information and belief, alleges that defendant, and the other manufacturers, well knowing that the price of sugar would rise prior to January 1, 1941, made various sales prior thereto after it and they had such knowledge to various purchasers so that the purchasers would reap the profits resulting from the increased price which defendant and said other corporations knew was about to occur, at the expense, detriment and loss of said plaintiff and other growers under like contracts.

XXVII.

Defendant has paid to said plaintiff the sum of

\$102,767.13 for 25,430.3 tons of sugar beets of 15.55% average sugar content, delivered by said plaintiff to defendant and accepted by defendant from plaintiff under said standard contract for the 1940 season. Said payment, however, was, as aforesaid, based not upon the sales of the sugar manufactured from sugar beets grown and delivered during the 1940 crop season, but upon the sales made during the 1940 season, regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Plaintiff is informed and believes and, upon such information and belief, alleges that said [17] sales were composed mainly of sugar manufactured previous to the 1940 season from beets not produced or delivered during the 1940 season.

XXVIII.

Heretofore said plaintiff made written demand upon defendant that it furnish plaintiff an accounting showing the average net returns from the sugar manufactured from sugar beets produced and delivered during the 1940 season, but defendant has refused to and will not furnish and has not furnished any such accounting and plaintiff has no way or means other than by an accounting suit to secure such information. Said plaintiff is informed and believes and, upon such information and belief, alleges that if plaintiff were paid upon the average net returns of sales of sugar manufactured from the beets delivered during the 1940 season, plaintiff would be entitled to receive under

said contract at least \$30,000 more than plaintiff did receive.

XXIX.

In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, defendant did not sell the sugar produced from the 1940 crop at the best price obtainable but sacrificed the same as aforesaid. Said plaintiff is informed and believes and, upon such information and belief, alleges that had defendant sold said sugar at the best price obtainable instead of sacrificing the same as aforesaid, plaintiff would have been entitled under said contract to receive at least \$10,000.00 more than plaintiff did receive. The exact amount of this damage can only be ascertained by an accounting as the figures therein involved are particularly within the knowledge of and shown by the records of defendant.

XXX.

In addition to the accounting to and paying plaintiff upon the wrong basis as hereinabove set forth, defendant, in arriving at the net return for sugar sold during the crop season of 1940, charged as expenses various improper amounts which should not have been [18] charged and which defendant was not entitled to charge, including the following:

(a) Insurance on stored raw sugar from previous years' crops.

(b) Personal property taxes on stored sugar from previous years' crops.

(c) Cost of reconditioning stored sugar from previous years' crops that needed reconditioning because of the long length of time it has been stored instead of being sold.

Said plaintiff does not know the amount of such items as the same were lumped with other items in the accounting furnished by defendant to plaintiff. Said matters are particularly within defendant's knowledge. An accounting thereof has been requested by plaintiff of defendant but the same has been refused and has not been furnished. Plaintiff is informed and believes and, upon such information and belief, alleges that had these improper items not been included, plaintiff would have been entitled to receive and there would have been due to plaintiff the additional sum of at least \$5,000.00.

XXXI.

a. In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, the defendant calculated the amount to be paid to plaintiff upon an incorrect basis and not the basis provided for in the contract. The sum of \$102,767.13 paid to plaintiff as aforesaid, was based upon 25,430.3 tons of beets of an average sugar content of 15.55% and upon an alleged net return per 100 lbs. of sugar of \$3.160. In arriving at said sum of \$102,767.13, defendant erroneously and contrary to said agreement took an intermediate sugar price of \$4.04. The intermediate sugar price arrived at by correct arithmetical calculations under the contract (assuming that \$3.160 was correct) would be

• \$4.04272 instead of \$4.04. As a result, defendant underpaid said plaintiff \$.00272 per ton, or a total of \$69.27, assuming that the net return per 100 lbs. of sugar was \$3.160. [19]

• b. Furthermore defendant calculated the amount to be paid said plaintiff Mandeville Island Farms, Inc. for the 1940 crop upon the said schedule set forth in the standard contract and not upon the said schedules set forth in the said determination of the Secretary of Agriculture. Beets of a sugar content of 15.55%, made into sugar which returned an average of \$3.160 per 100 lbs. to the manufacturer would pay the grower \$4.255 a ton, under the said determination schedules instead of \$4.04 a ton under the standard contract, schedule, a difference of 21 cents a ton or \$5,467.52 on 25,430.3 tons, which sum is due and unpaid to said plaintiff in addition to the other sums herein referred to.

And As a Third Count, plaintiff Roscoe C. Zuckerman alleges:

XXXII.

The ground upon which the jurisdiction of the court depends is diversity of citizenship.

XXXIII.

Said plaintiff refers to Pars. II, III, IV, V, VI, VII, VIII, IX, X and subpar. e of Par. XI hereof and incorporates the same herein by reference as though here set forth in full.

XXXIV.

Said plaintiff refers to Par. XVIII hereof and

incorporates the same herein by reference as though here set forth in full.

XXXV.

On January 1, 1942, the price of raw sugar increased substantially in price, and during the month of April, 1942, the price of sugar again increased substantially in price and remained at said higher price for many months thereafter. Said plaintiff is informed and believes and, upon such information and belief, alleges that defendant, instead of selling said sugar on or before August 31, 1942, at the high prices that prevailed from April until August, 1942, sold but little of it and retained most of it and sold it subsequent to [20] August 31, 1942, at the high prices then prevailing. Defendant did not account to nor pay said plaintiff the price provided for in the contract for said sugar but, instead, defendant determined the price to be paid said plaintiff for said sugar, not upon the prices actually received for the sugar manufactured from sugar beets produced by plaintiff and other growers during the crop season of 1941 and delivered during said crop season under said contract, but used the prices obtained for sugar sold from August 1, 1941 to August 31, 1942, regardless of when the sugar then sold was produced or manufactured. Said sales consisted mainly of sugar on hand and in storage August 1, 1941 and which was grown and delivered in previous crop seasons and which was sold at the lower prices that prevailed from August 1, 1941 to December 31, 1941, instead of at

the higher prices that prevailed when the 1941 sugar was actually sold. Said plaintiff is informed and believes and, upon such information and belief, alleges that defendant and the other sugar manufacturers, well knowing that the price of sugar would rise on January 1, 1942, made various sales prior thereto after it had such knowledge to various purchasers so that the purchasers would reap the profits resulting from the increased price which defendant knew was about to occur, at the expense, detriment and loss of said plaintiff and other growers under like contracts.

XXXVI.

Defendant has paid to said plaintiff the sum of \$74,794.76 for 14,144.7 tons of sugar beets of 15.47% average sugar content, delivered by said plaintiff to defendant and accepted by defendant from plaintiff under said standard contract for the 1941 season. Said payment, however, was, as aforesaid, based not upon the sales of the sugar manufactured from sugar beets grown and delivered during the 1941 crop season, but upon the sales made during the 1941 season, regardless of when the beets were grown and delivered and regardless of when the sugar was manufactured. Plaintiff is informed and [21] believes and, upon such information and belief, alleges that said sales were composed mainly of sugar manufactured previous to the 1941 season from beets not produced or delivered during the 1941 season.

XXXVII.

Heretofore said plaintiff made written demand upon defendant that it furnish plaintiff an accounting showing the average net returns from the sugar manufactured from sugar beets produced and delivered during the 1941 season, but defendant has refused to and will not furnish and has not furnished any such accounting and plaintiff has no way or means other than by an accounting suit to secure such information. Said plaintiff is informed and believes and, upon such information and belief, alleges that if plaintiff were paid upon the average net returns of sales of sugar manufactured from beets delivered during the 1941 season, plaintiff would be entitled to receive under said contract at least \$30,000 more than plaintiff did receive.

XXXVIII.

In addition to accounting to and paying said plaintiff on the wrong basis as hereinabove set forth, defendant did not sell the sugar produced from the 1941 crop at the best price obtainable but sacrificed the same as aforesaid. Said plaintiff is informed and believes and, upon such information and belief, alleges that had defendant sold said sugar at the best price obtainable instead of sacrificing the same as aforesaid, plaintiff would have been entitled under said contract to receive at least \$10,000.00 more than plaintiff did receive. The exact amount of this damage can only be ascertained by an accounting as the figures therein involved are particularly within the knowledge of and shown by the records of defendant.

XXXIX.

In addition to the accounting to and paying plaintiff upon the wrong basis as hereinabove set forth, defendant, in arriving at the net return for sugar sold during the crop season of 1941, charged as expenses various improper amounts which should not have been charged and which defendant was not entitled to charge, including the following:

(a) Insurance on stored raw sugar from previous years' crops.

(b) Personal property taxes on stored sugar from previous years' crops.

(c) Cost of reconditioning stored sugar from previous years' crops that needed reconditioning because of the long length of time it has been stored instead of being sold.

Said plaintiff does not know the amount of such items as the same were lumped with other items in the accounting furnished by defendant to plaintiff. Said matters are particularly within defendant's knowledge. An accounting thereof has been requested by plaintiff of defendant but the same has been refused and has not been furnished. Plaintiff is informed and believes and, upon such information and belief, alleges that had these improper items not been included, plaintiff would have been entitled to receive and there would have been due to plaintiff the additional sum of at least \$5,000.00.

XL.

a. In addition to accounting to and paying said

plaintiff on the wrong basis as hereinabove set forth, the defendant calculated the amount to be paid to plaintiff upon an incorrect basis and not the basis provided for in the contract. The sum of \$74,794.76 paid to plaintiff as aforesaid, was based upon 14,144.7 tons of beets of an average sugar content of 15.47% and upon an alleged net return per 100 lbs. of sugar of \$3.950. In arriving at said sum of \$74,794.76, defendant erroneously and contrary to said agreement took an intermediate sugar price of \$5.29. The intermediate sugar price arrived at by correct arithmetical calculations under the contract (assuming that \$3.950 was correct) would be \$5.32128 instead of \$5.29. As a result, defendant underpaid said plaintiff \$.03128 per ton, or a total of \$442.45, assuming that the net return per 100 lbs. of sugar was \$3.950. [23]

b. Furthermore, defendant calculated the amount to be paid said plaintiff Roscoe Zuckerman for the 1941 crop upon the said schedules set forth in the standard contract and not upon the said schedules set forth in the said determination of the Secretary of Agriculture. Beets of sugar content of 15.47% made into sugar which returned on an average \$3.950 per 100 lbs. to the manufacturer would pay the grower \$5.46048 a ton under the said determination schedule instead of \$5.29 as paid by defendant to plaintiff, a difference of \$.17048 a ton or \$2411.39 on 14,144.7 tons, which sum is due and unpaid to said plaintiff in addition to the other sums referred to herein.

Wherefore, plaintiffs pray judgment against defendant as follows:

1. That defendant be required to account to plaintiffs in connection with all sugar beets delivered by plaintiffs to defendant during the crop years 1939, 1940, and 1941, and for all sugar manufactured therefrom and sold by said defendant.

2. That plaintiff Mandeville Island Farms, Inc., have judgment for the sum found to be due it by said accounting and that the amount so found due be trebled.

3. That plaintiff Roscoe C. Zuckerman have judgment for the sum found to be due him by said accounting and that the amount so found due be trebled.

4. That plaintiff Mandeville Island Farms, Inc., have judgment against the defendant for \$345,043.80 with interest from August 31, 1941, together with attorney fees in such sum as the court may deem reasonable.

5. That plaintiff Roscoe C. Zuckerman have judgment against the defendant for \$112,192.14 with interest from August 31, 1941, together with attorney fees in such sum as the court may deem reasonable.

6. That plaintiff Mandeville Island Farms, Inc., have judgment against the defendant for the sum of \$50,536.79 upon the second count, [24] together with interest thereon from August 31, 1941.

7. That plaintiff Roscoe C. Zuckerman have

judgment against the defendant for the sum of \$47,853.64 upon the third count, together with interest thereon from August 31, 1942.

8. That plaintiffs have judgment for their costs herein involved and attorney fees.

9. That plaintiffs have such other and further relief as may be fit and proper in the premises.

/s/ WOOD, CRUMP, ROGERS &
ARNDT

/s/ By STANLEY M. ARNDT
Attorneys for Plaintiffs

[Endorsed]: Filed July 30, 1945. [25]

[Title of District Court and Cause.]

**NOTICE OF MOTION TO DISMISS OR IN
THE ALTERNATIVE TO STRIKE FROM
COMPLAINT OR FOR A MORE DEFIN-
NITE STATEMENT OR FOR A BILL OF
PARTICULARS**

**To Plaintiffs in the Above Entitled Action and to
Messrs. Wood, Crump, Rogers & Arndt, Their
Attorneys:**

Please Take Notice that defendant above named will, on Monday, October 1, 1945, at the hour of 10:00 o'clock a. m., or as soon thereafter as counsel may be heard, move the above entitled court, in Court Room No. 6 thereof, in the United States

Court House and Post Office Building, Los Angeles, the Honorable Ben Harrison, Judge Presiding, as follows: &

1. To dismiss the action because the complaint fails [26] to state a claim against defendant upon which relief can be granted.
2. To dismiss the first count attempted to be set forth in said complaint because the same fails to state a claim against defendant upon which relief can be granted.
3. To dismiss said first count because the same fails to state a claim against defendant upon which relief can be granted under the anti-trust laws of the United States, or any thereof.
4. To dismiss said first count because the same is barred by the provisions of Section 359 of the Code of Civil Procedure of California,
5. To dismiss the second count attempted to be set forth in said complaint because the same fails to state a claim against defendant upon which relief can be granted.
6. To dismiss the third count attempted to be set forth in said complaint because the same fails to state a claim against defendant upon which relief can be granted.
7. In the alternative, and in the event the above motion to dismiss are for any reason denied, to strike from the complaint, because immaterial, the following parts or portions thereof:

(a) The whole of paragraph numbered VIII, pages 5, 6.

(b) The whole of paragraph numbered X, page 7.

(c) That part of paragraph numbered XI appearing on page 10 thereof and reading as follows:

"The reasonable price for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in paragraph VIII hereof."

(d) The whole of paragraph numbered XV, pages 11, 12.

(e) The whole of subparagraph b of paragraph numbered XXVII, appearing on page 19 thereof.

(f) The whole of subparagraph b of paragraph numbered XXXVI, appearing on page 23 thereof.

8. In the alternative, and in the event the above motions to dismiss are for any reason denied, for a more definite statement or for a bill of particulars to enable defendant properly to prepare its responsive pleading and to prepare for trial. The defects complained of and the details desired are as follows:

(a) The failure to specify the facts, if any, warranting the conclusion of the pleader expressed in paragraph numbered VII on pages 7-8 that the purpose of the alleged conspiracy referred to in said paragraph was "to unlawfully monopolize and restrain commerce in sugar and sugar beets among the several states" or "to unlawfully fix prices to

be paid the growers of sugar beets" or that the activities complained of were "all in violation of the anti-trust laws of the United States."

(b) The failure to specify the facts, if any, warranting the conclusion of the pleader expressed in paragraph numbered XIII on pages 10-11, that as "a direct, expected and planned result of said conspiracy, the free and natural flow of commerce [28] in interstate trade was intentionally hindered and obstructed."

(c) The failure to specify how, or in what manner or to what extent, or with reference to what commodity, if any, the free and natural flow of commerce in interstate trade was intentionally or otherwise hindered or obstructed, as alleged.

(d) The failure to specify any facts warranting the inference or finding that the activities complained of in any way restrained or otherwise affected interstate commerce.

(e) The failure to specify any facts warranting the inference or finding that the damages assertedly suffered by plaintiffs or either of them, resulted proximately or at all from any act or acts prohibited by the anti-trust laws of the United States.

Said latter motion will be made upon the ground that none of the foregoing matters are alleged with sufficient definiteness or particularity to enable defendant properly to prepare its responsive pleading or to prepare for trial.

In order to facilitate the presentation, considera-

tion and discussion of the foregoing motions, and inasmuch as defendant does not understand that there is any controversy between the parties as to form or terminology of the standard form contracts referred to in the complaint, there are hereto annexed, marked respectively Exhibits A, B, and C and made a part hereof, specimen of the same for the crop years 1939, 1940 and 1941.

Dated: September 15, 1945.

O'MELVENY & MYERS
PIERCE WORKS,
JOHN WHYTE

/s/ By PIERCE WORKS

Attorneys for Defendant.

EXHIBIT A

Form 3549-D—1500

MEMORANDUM OF AGREEMENT—
SEASON 1939

Between Grower

AND

AMERICAN CRYSTAL SUGAR COMPANY
CLARKSBURG FACTORY

For delivery of Sugar Beets at.....

Witnesseth, that for and in consideration of the mutual covenants and payments hereinafter set out, the respective parties hereto mutually undertake and agree as follows, to-wit:

1. The Grower will prepare land for, plant,

block, thin, cultivate, irrigate, harvest, and deliver during the season of 1939, in compliance with the directions of the Company, as given from time to time, acres of sugar beets, to be grown on the following described land, to-wit:

.....State of California.

2. The seed to be used in growing said beets shall be furnished by the Company for the price of fourteen cents (14c) per pound, which the Grower agrees to pay. Seed furnished by the Company shall not be planted upon any land not contracted to the Company. Any seed furnished by the Company and not planted shall be returned in good order to the Company, at the end of the planting season, and the Grower credited therefor. No credit will be given for seed not returned prior to July 1, 1939.

3. The Grower agrees that at his own expense he will harvest and deliver to the Company all beets grown by him, said delivery to be made at such times and in such quantities and to such place or places as may be designated by the Company. All beets delivered hereunder shall be properly topped, that is to say, the tops shall be squarely cut off at the base of the bottom leaf in case of medium or small size beets, and the crown trimmed up from the base of the bottom leaf in the case of large beets, and shall be free from stones, trash, excess dirt, and foreign substances liable to interfere with factory work,

and shall be subject to proper deductions for tare. A distinct evidence of leaf scar is to be left after top tare is taken.

4. The Company has the privilege at various times during the growing and harvesting season to ascertain the quality of the beets grown under this contract by causing such beets to be sampled and polarized. The Company has the option of rejecting any beets where the above mentioned conditions have not been properly complied with, also any diseased or wilted beets or beets that are not suitable in the judgment of the Company for the manufacture of sugar, anything in this contract to the contrary notwithstanding.

In no event shall the Company be liable to the Grower for partial or complete failure of crop, or for any injury or damage to beets.

5. All sound beets grown in accordance with and under this contract shall be bought by the Company and paid for by it according to the following terms and schedule of prices:

The price per ton (2,000 pounds) for beets delivered hereunder to the Company shall be determined upon the average net returns (said net returns being defined in Paragraph No. 6 hereof) received for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of twelve months commencing August 1, 1939, and based upon the Company's test of sugar content of the individual grower's beets in accordance with the following schedule:

PERCENTAGE SUGAR IN BEETS

Net Return
Received

For Sugar 23% 22% 21% 20% 19% 18% 17% 16% 15% 14% 13%

VALUE OF ONE TON OF BEETS EXPRESSED IN DOLLARS AND CENTS

5	cents	10.71	10.24	9.77	9.31	8.74	8.28	7.82	7.28	6.72	6.20	5.69
4¾	"	10.21	9.76	9.32	8.87	8.33	7.89	7.46	6.94	6.41	5.91	5.42
4½	"	9.70	9.28	8.86	8.44	7.92	7.51	7.09	6.60	6.09	5.62	5.15
4¼	"	9.00	8.61	8.22	7.83	7.35	6.97	6.58	6.12	5.65	5.21	4.78
4	"	8.30	7.94	7.58	7.22	6.78	6.42	6.07	5.64	5.21	4.81	4.41
3¾	"	7.60	7.27	6.94	6.61	6.21	5.88	5.56	5.17	4.77	4.40	4.04
3½	"	7.00	6.70	6.39	6.09	5.72	5.42	5.12	4.76	4.40	4.05	3.72
3¼	"	6.50	6.22	5.94	5.66	5.31	5.03	4.75	4.42	4.08	3.77	3.45

vs. American Crystal Sugar Co.

Intermediate sugar prices and beet tests in the same relative proportion as reflected in the interval in which such fluctuations occur. If sugar prices or sugar contents are higher or lower than those shown in the foregoing schedule, the settlement figure for such beets shall be increased or decreased according to the foregoing formula, using the immediately succeeding or preceding interval, as the case may be, as the basis for calculation, provided also that if the net return for sugar should fall below \$3.25 per hundred, in such event the price per ton of beets hereinbefore fixed by this paragraph shall be further decreased in the proportion of one per cent (1%) for each five cents (5c) of decrease in the net return per one hundred pounds of sugar below \$3.25.

Settlements will be made as follows:

For all beets delivered up to and including the end of any month, settlement will be made on or before the 15th of the succeeding month. The foregoing settlements will be made at as high an amount per ton as may be justified in the judgment of the Company based upon the Company's test of sugar content of the individual grower's beets and the Company's estimate of the net returns to be received for sugar sold during the twelve months period beginning August 1, 1939. Further settlements will be made on the aforesaid price of beets from time to time and in such amounts as the Company may deem to be justified by market conditions and quantity of sugar sold. Final settlement for all beets delivered hereunder shall be made in accordance

with the terms of this contract not later than August 31, 1940.

6. The net returns as aforesaid during said period shall be determined by a Certified Public Accountant, chosen by the Companies, (whose determination shall be final) by deducting from the gross sales price all such charges and expenditures as are regularly and customarily deducted from gross sales price of sugar, in accordance with the respective Companies' established systems of accounting, showing net returns from sugar sold, after deducting also all excise, sales, and other taxes, if any, either now or hereafter imposed by act of law or state or Federal regulation.

7. Any advances by the Company to the Grower either in seed, money, or otherwise, shall constitute a debt from the Grower to the Company which the Company shall have the right to collect as in the case of any other contractual obligation. The Company shall have the right, at its option, to treat any such advances as part payment for beets grown and delivered under this contract. Any such indebtedness which is due and payable or which may hereafter become due and payable from the Grower to the Company shall be, become, and remain a first and prior lien on the crop of sugar beets to the grown hereunder and shall be deducted by the Company from any initial or subsequent payments from the Company to the Grower which shall become due hereunder, or under any subsequent beet contract between the Company and the Grower. If the beet

crop to be grown hereunder is grown on leased land, payments to become due hereunder from the Company to the Grower shall be payable jointly to the Grower and the landlord unless the landlord shall have previously filed with the Company his written release in form satisfactory to the Company

8. The Grower may, at his own expense, have representatives (weighmen, taremen, and chemists) in scale house, tare room, and/or laboratory to inspect weights and work done, such representatives to be experienced in the line of work performed and satisfactory to the Company.

9. It is understood and agreed that if any governmental authority shall establish any restriction, allotment, or quota upon the growing, production, or processing of beets, or the output, transportation, or sale of beet sugar, then the Company may reduce to the extent necessary or required by lawful authority the acreage of beets herein contracted for, and shall be obligated to purchase only such reduced acreage of beets.

10. Fire, strikes, accidents, acts of God and of the public enemy, or other causes beyond the control of the parties which prevent the Grower from the performance of this contract or the Company from utilizing the beets contracted for in the manufacture of sugar therefrom, shall excuse the respective parties hereto from the performance of this contract.

11. The Company, at its sole option and elec-

tion, unless notified in writing by the Grower prior to July 1, 1939, not to make such deduction, is authorized to deduct from any monies coming due for beets delivered under this contract not to exceed the sum of two cents (2c) per net ton on the Grower's share of the beets delivered by the Grower hereunder, and to pay such amount to the Central California Beet Growers Association, Ltd.

12. No agent of the Company is authorized to make any alterations, erasures, or additions to this printed form of contract.

13. This agreement shall be binding upon both the Grower, his heirs, legal representatives, and assigns, and upon the Company, its successors and assigns, and shall not be transferable by the Grower without the written consent of the Company, its successors and assigns.

Executed in duplicate originals this.....
day of....., 193.....

AMERICAN CRYSTAL SUGAR COMPANY

By.....
.....Grower
.....Grower

EXHIBIT B

1500-3549-D-10-39

MEMORANDUM OF AGREEMENT—

SEASON 1940

Between Grower

AND

AMERICAN CRYSTAL SUGAR COMPANY

CLARKSBURG FACTORY

Witnesseth, that for and in consideration of the mutual covenants and payments hereinafter set out, the respective parties hereto mutually undertake and agree as follows, to-wit:

1. The Grower will prepare land for, plant, block, thin, cultivate, irrigate, harvest, and deliver during the season of 1940,

acres of sugar beets, to be grown on the lands described on the reverse side hereof.

2. The seed to be used in growing said beets shall be furnished by the Company for the price of fourteen cents (14c) per pound, which the Grower agrees to pay. Seed furnished by the Company shall not be planted upon any land not contracted to the Company. Any seed furnished by the Company and not planted shall be returned in good order to the Company, at the end of the planting season, and the Grower credited therefor. No credit will be given for seed not returned prior to July 1, 1940.

3. The Grower agrees that at his own expense he will harvest and deliver to the Company all beets grown by him, said delivery to be made at such times and in such quantities and to such place or places as may be designated by the Company. All beets delivered hereunder shall be properly topped, that is to say, the tops shall be squarely cut off at the base of the bottom leaf in case of medium or small size beets, and the crown trimmed up from the base of the bottom leaf in the case of large beets, and shall be free from stones, trash, excess dirt, and foreign substances liable to interfere with factory work, and shall be subject to proper deductions for tare. A distinct evidence of leaf scar is to be left after top tare is taken.

4. The Company has the privilege at various times during the growing and harvesting season to ascertain the quality of the beets grown under this contract by causing such beets to be sampled and polarized. The Company has the option of rejecting any beets where the above mentioned conditions have not been properly complied with, also any diseased or wilted beets or beets that are not suitable in the judgment of the Company for the manufacture of sugar, anything in this contract to the contrary notwithstanding.

In no event shall the Company be liable to the Grower for partial or complete failure of crop, or for any injury or damage to beets.

5. All sound beets grown in accordance with and under this contract shall be bought by the Company

and paid for by it according to the following terms and schedule of prices:

The price per ton (2,000 pounds) for beets delivered hereunder to the Company shall be determined upon the average net returns (said net returns being defined in Paragraph No. 6 hereof) received for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of twelve months commencing August 1, 1940, and based upon the Company's test of sugar content of the individual grower's beets in accordance with the following schedule:

25

12

PERCENTAGE SUGAR IN BEETS

Net Return
Received

For Sugar 23% 22% 21% 20% 19% 18% 17% 16% 15% 14% 13%

VALUE OF ONE TON OF BEETS EXPRESSED IN DOLLARS AND CENTS

5	cents	10.71	10.24	9.77	9.31	8.74	8.28	7.82	7.28	6.72	6.20	5.69
4¾	"	10.21	9.76	9.32	8.87	8.33	7.89	7.46	6.94	6.41	5.91	5.42
4½	"	9.70	9.28	8.86	8.44	7.92	7.51	7.09	6.60	6.09	5.62	5.15
4¼	"	9.00	8.61	8.22	7.83	7.35	6.97	6.58	6.12	5.65	5.21	4.78
4	"	8.30	7.94	7.58	7.22	6.78	6.42	6.07	5.64	5.21	4.81	4.41
3¾	"	7.60	7.27	6.94	6.61	6.21	5.88	5.56	5.17	4.77	4.40	4.04
3½	"	7.00	6.70	6.39	6.09	5.72	5.42	5.12	4.76	4.40	4.05	3.72
3¼	"	6.50	6.22	5.94	5.66	5.31	5.03	4.75	4.42	4.08	3.77	3.45
3	"	5.55	5.31	5.07	4.83	4.53	4.30	4.06	3.77	3.49	3.21	2.95

vs. American Crystal Sugar Co.

Intermediate sugar prices and beet tests in the same relative proportion as reflected in the interval in which such fluctuations occur. If sugar prices or sugar contents are higher or lower than those shown in the foregoing schedule, the settlement figure for such beets shall be increased or decreased according to the foregoing formula, using the immediately succeeding or preceding interval, as the case may be, as the basis for calculation.

Settlements will be made as follows:

For all beets delivered up to and including the end of any month, settlement will be made on or before the 15th of the succeeding month. The foregoing settlements will be made at as high an amount per ton as may be justified in the judgment of the Company based upon the Company's test of sugar content of the individual grower's beets and the Company's estimate of the net returns to be received for sugar sold during the twelve months period beginning August 1, 1940. Further settlements will be made on the aforesaid price of beets from time to time and in such amounts as the Company may deem to be justified by market conditions and quantity of sugar sold. Final settlement for all beets delivered hereunder shall be made in accordance with the terms of this contract not later than August 31, 1941.

6. The net returns as aforesaid during said period shall be determined by a Certified Public Accountant, chosen by the Companies, (whose deter-

mination shall be final) by deducting from the gross sales price all such charges and expenditures as are regularly and customarily deducted from gross sales price of sugar, in accordance with the respective Companies' established systems of accounting, showing net returns from sugar sold, after deducting also all excise, sales, and other taxes, if any, either now or hereafter imposed by act of law or state or Federal regulation.

7. Any advances by the Company to the Grower either in seed, money, or otherwise, shall constitute a debt from the Grower to the Company which the Company shall have the right to collect as in the case of any other contractual obligation. The Company shall have the right, at its option, to treat any such advances as part payment for beets grown and delivered under this contract. Any such indebtedness which is due and payable or which may hereafter become due and payable from the Grower to the Company shall be, become, and remain a first and prior lien on the crop of sugar beets to be grown hereunder and shall be deducted by the Company from any initial or subsequent payments from the Company to the Grower which shall become due hereunder, or under any subsequent beet contract between the Company and the Grower.

8. The Grower may, at his own expense, have representatives (weighmen, taremen, and chemists) in scale house, tare room, and/or laboratory to inspect weights and work done, such representatives

to be experienced in the line of work performed and satisfactory to the Company.

9. It is understood and agreed that if any governmental authority shall establish any restriction, allotment, or quota upon the growing, production, or processing of beets, or the output, transportation, or sale of beet sugar, then the Company may reduce to the extent necessary or required by lawful authority the acreage of beets herein contracted for, and shall be obligated to purchase only such reduced acreage of beets.

10. Fire, strikes, accidents, acts of God and of the public enemy, or other causes beyond the control of the parties which prevent the Grower from the performance of this contract or the Company from utilizing the beets contracted for in the manufacture of sugar therefrom, shall excuse the respective parties hereto from the performance of this contract.

11. The Company, at its sole option and election, unless notified in writing by the Grower prior to July 1, 1940, not to make such deduction, is authorized to deduct from any monies coming due for beets delivered under this contract not to exceed the sum of two cents (2c) per net ton on the Grower's share of the beets delivered by the Grower hereunder, and to pay such amount to the Central California Beet Growers Association, Ltd.

12. The beet crop covered hereby is to be grown on land leased by the grower from.....

.....(hereinafter called "Landowner")
whose address is.....,
wherefore, the Company is authorized to pay.....
per cent of the gross amount due hereunder to the
said Landowner, his heirs, personal representatives,
or assigns.

13. No agent of the Company is authorized to
make any alterations, erasures, or additions to this
printed form of contract.

14. This agreement shall be binding upon both
the Grower, his heirs, legal representatives, and as-
signs, and upon the Company, its successors and as-
sign, and shall not be transferable by the Grower
without the written consent of the Company, its suc-
cessors and assigns.

Executed in duplicate originals this.....
day of....., 19.....
Landowner

(To be signed by landowner or agent)

AMERICAN CRYSTAL SUGAR COMPANY

By.....
.....Grower
.....Grower

2

EXHIBIT C

1500—3549-D—11-40

MEMORANDUM OF AGREEMENT—

SEASON 1941

Between Grower

AND

AMERICAN CRYSTAL SUGAR COMPANY
CLARKSBURG FACTORY

Witnesseth, that for and in consideration of the mutual covenants and payments hereinafter set out, the respective parties hereto mutually undertake and agree as follows, to-wit:

1. The Grower will prepare land for, plant, block, thin, cultivate, irrigate, harvest, and deliver during the season of 1941, acres of sugar beets, to be grown on the lands described on the reverse side hereof.

2. The seed to be used in growing said beets shall be furnished by the Company for the price of thirteen cents (13c) per pound, which the Grower agrees to pay. Seed furnished by the Company shall not be planted upon any land not contracted to the Company. Any seed furnished by the Company and not planted shall be returned in good order to the Company, at the end of the planting season, and the Grower credited therefor. No credit will be given for seed not returned prior to July 1, 1941.

3. The Grower agrees that at his own expense he will harvest and deliver to the Company all beets grown by him, said delivery to be made at such times and in such quantities and to such place or places as may be designated by the Company. All beets delivered hereunder shall be properly topped, that is to say, the tops shall be squarely cut off at the base of the bottom leaf in case of medium or small size beets, and the crown trimmed up from the base of the bottom leaf in the case of large beets, and shall be free from stones, trash, excess dirt, and foreign substances liable to interfere with factory work, and shall be subject to proper deductions for tare. A distinct evidence of leaf scar is to be left after top tare is taken.

4. The Company has the privilege at various times during the growing and harvesting season to ascertain the quality of the beets grown under this contract by causing such beets to be sampled and polarized. The Company has the option of rejecting any beets where the above mentioned conditions have not been properly complied with, also any diseased or wilted beets or beets that are not suitable in the judgment of the Company for the manufacture of sugar, anything in this contract to the contrary notwithstanding.

In no event shall the Company be liable to the Grower for partial or complete failure of crop, or for any injury or damage to beets.

5. All sound beets grown in accordance with and under this contract shall be bought by the Company

and paid for by it according to the following terms and schedule of prices:

The price per ton (2,000 pounds) for beets delivered hereunder to the Company shall be determined upon the average net returns (said net returns being defined in Paragraph No. 6 hereof) received for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of twelve months commencing August 1, 1941, and based upon the Company's test of sugar content of the individual grower's beets in accordance with the following schedule:

PERCENTAGE SUGAR IN BEETS

Net Return
Received

For Sugar 23% 22% 21% 20% 19% 18% 17% 16% 15% 14% 13%

VALUE OF ONE TON OF BEETS EXPRESSED IN DOLLARS AND CENTS

5	cents	10.71	10.24	9.77	9.31	8.74	8.28	7.82	7.28	6.72	6.20	5.69
4¾	"	10.21	9.76	9.32	8.87	8.33	7.89	7.46	6.94	6.41	5.91	5.42
4½	"	9.70	9.28	8.86	8.44	7.92	7.51	7.09	6.60	6.09	5.62	5.15
4¼	"	9.00	8.61	8.22	7.83	7.35	6.97	6.58	6.12	5.65	5.21	4.78
4	"	8.30	7.94	7.58	7.22	6.78	6.42	6.07	5.64	5.21	4.81	4.41
3¾	"	7.60	7.27	6.94	6.61	6.21	5.88	5.56	5.17	4.77	4.40	4.04
3½	"	7.00	6.70	6.39	6.09	5.72	5.42	5.12	4.76	4.40	4.05	3.72
3¼	"	6.50	6.22	5.94	5.66	5.31	5.03	4.75	4.42	4.08	3.77	3.45
3	"	6.00	5.74	5.48	5.22	4.90	4.64	4.39	4.08	3.77	3.48	3.19

U.S. American Crystal Sugar Co.

Intermediate sugar prices and beet tests in the same relative proportion as reflected in the interval in which such fluctuations occur. If sugar prices or sugar contents are higher or lower than those shown in the foregoing schedule, the settlement figure for such beets shall be increased or decreased proportionately, using the immediately succeeding or preceding interval, as the case may be, as the basis for calculation.

Settlements will be made as follows:

For all beets delivered up to and including the end of any month, settlement will be made on or before the 15th of the succeeding month. The foregoing settlements will be made at as high an amount per ton as may be justified in the judgment of the Company based upon the Company's test of sugar content of the individual grower's beets and the Company's estimate of the net returns to be received for sugar sold during the twelve months period beginning August 1, 1941. Further settlements will be made on the aforesaid price of beets from time to time and in such amounts as the Company may deem to be justified by market conditions and quantity of sugar sold. Final settlement for all beets delivered hereunder shall be made in accordance with the terms of this contract not later than August 31, 1942.

6. The net returns as aforesaid during said period shall be determined by a Certified Public Accountant, chosen by the Companies, (whose deter-

mination shall be final) by deducting from the gross sales price all such charges and expenditures as are regularly and customarily deducted from gross sales price of sugar, in accordance with the respective Companies' established systems of accounting, showing net returns from sugar sold, after deducting also all excise, sales, and other taxes, if any, either now or hereafter imposed by act of law or state or Federal regulation.

7. Any advances by the Company to the Grower either in seed, money, or otherwise, shall constitute a debt from the Grower to the Company which the Company shall have the right to collect as in the case of any other contractual obligation. The Company shall have the right, at its option, to treat any such advances as part payment for beets grown and delivered under this contract. Any such indebtedness which is due and payable or which may hereafter become due and payable from the Grower to the Company shall be, become, and remain a first and prior lien on the crop of sugar beets to be grown hereunder and shall be deducted by the Company from any initial or subsequent payments from the Company to the Grower which shall become due hereunder, or under any subsequent beet contract between the Company and the Grower.

8. The Grower may, at his own expense, have representatives (weighmen, taremen, and chemists) in scale house, tare room, and/or laboratory to inspect weights and work done, such representatives

to be experienced in the line of work performed and satisfactory to the Company.

9. It is understood and agreed that if any governmental authority shall establish any restriction, allotment, or quota upon the growing, production, or processing of beets, or the output, transportation, or sale of beet sugar, then the Company may reduce to the extent necessary or required by lawful authority the acreage of beets herein contracted for, and shall be obligated to purchase only such reduced acreage of beets.

10. Fire, strikes, accidents, acts of God and of the public enemy, or other causes beyond the control of the parties which prevent the Grower from the performance of this contract or the Company from utilizing the beets contracted for in the manufacture of sugar therefrom, shall excuse the respective parties hereto from the performance of this contract.

11. The Company, at its sole option and election, unless notified in writing by the Grower prior to July 1, 1941, not to make such deduction, is authorized to deduct from any monies coming due for beets delivered under this contract not to exceed the sum of two cents (2c) per net ton on the Grower's share of the beets delivered by the Grower hereunder, and to pay such amount to the Central California Beet Growers Association, Ltd.

12. The beet crop covered hereby is to be grown on land leased by the grower from.....

..... (hereinafter called "Landowner")
whose address is.....
wherefore, the Company is authorized to pay.....
per cent of the gross amount due hereunder to the
said Landowner, his heirs, personal representatives,
or assigns.

13. No agent of the Company is authorized to
make any alterations, erasures, or additions to this
printed form of contract.

14. This agreement shall be binding upon both
the Grower, his heirs, legal representatives, and as-
signs, and upon the Company, its successors and as-
sign, and shall not be transferable by the Grower
without the written consent of the Company, its suc-
cessors and assigns.

Executed in duplicate originals this.....
day of....., 19.....
Landowner

(To be signed by landowner or agent)

AMERICAN CRYSTAL SUGAR COMPANY

By.....
..... Grower
..... Grower

State of California

County of Los Angeles—ss.

Marjorie McCoy being first duly sworn, on oath says:

That affiant is and was at the time of the service herein over the age of eighteen (18) years and not a party to the within proceeding; that she is a citizen of the United States and a resident of the County of Los Angeles, State of California; that her business address is 900 Title Insurance Building, 433 South Spring Street, Los Angeles 13, California;

That Wood, Crump, Rogers & Arndt are attorneys of record for plaintiff herein, and the office address of said attorneys is 458 South Spring Street, Los Angeles 13, California.

That on September 15, 1945, affiant served the within Notice of Motion to Dismiss or in the Alternative to Strike from Complaint or for a More Definite Statement or for Bill of Particulars upon counsel above named by depositing a true copy thereof in a United States mail box at Los Angeles, California, in a sealed envelope with postage thereon fully prepaid and addressed to said counsel as follows: Wood, Crump, Rogers & Arndt, 458 South Spring Street, Los Angeles, 13, California. That

there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ MARJORIE McCOY

Subscribed and sworn to before me this 15th day of September, 1945.

RUBY E. SLOANAKER

Notary Public in and for said
County and State

[Endorsed]: Filed Sept. 15, 1945. [33]

At a stated term, to-wit: The September Term, A. D. 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 20th day of September in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Ben Harrison, District Judge.

[Title of Cause.]

Good cause appearing therefor, it is hereby ordered that the motion to dismiss, etc., of defendant, filed Sept. 15, 1945, and noticed for hearing on Oct. 1, 1945, is hereby ordered continued to Nov. 12, 1945, at 10 a. m., for hearing. [34]

At a stated term, to-wit: The September Term, A. D. 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 31st day of October in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Ben Harrison, District Judge.

[Title of Cause.]

Good cause appearing therefor, it is hereby ordered that each of the above cases, now on the calendar for November 12, 1945, at 10 a. m., be continued to same time for hearing on November 13, 1945, and the Clerk is directed to notify counsel.

At a stated term, to-wit: The September Term, A. D. 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Tuesday the 13th day of November in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Ben Harrison, District Judge.

[Title of Cause.]

This cause coming on for hearing motion of the defendant to dismiss, or in the alternative, to strike

from the complaint, or for a more definite statement, or for a Bill of Particulars, pursuant to notice, motion, and points and authorities filed September 15, 1945; Stanley Arndt, Esq., appearing as counsel for the plaintiff; Pierce Works, Esq., appearing as counsel for the defendant:

Attorney Works makes a statement; the Court makes a statement; and Attorney Arndt makes a statement. It is ordered that the cause be, and it hereby is, continued to Nov. 19, 1945, at 11 a. m., for further hearing of said motions. [36]

At a stated term, to-wit: The September Term, A. D. 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 19th day of November in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Ben Harrison, District Judge.

[Title of Cause.]

This cause coming on, for further hearing of motion of defendant to dismiss, or in the alternative, to strike from complaint, or for a more definite statement, or for a Bill of Particulars, pursuant to notice, motion, and points and authorities, and order of continuance heretofore entered:

It is ordered that the cause be, and it hereby is, continued to November 26, 1945, at 2 p. m., for further hearing of said motion. [37]

At a stated term, to-wit: The September Term, A. D. 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 26th day of November in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Ben Harrison, District Judge.

[Title of Cause.]

This cause coming on for further hearing of motion of defendant to dismiss, or in the alternative, to strike from complaint, or for a more definite statement, or for a Bill of Particulars, pursuant to notice, motion, and points and authorities, and order of continuance heretofore entered; Stanley Arndt, Esq., appearing as counsel for the plaintiff; Pierce Works, Esq., appearing as counsel for the defendant:

Attorney Arndt makes a statement and Attorney Works makes a statement. The Court makes a statement. Written stipulation is presented to the Court and order is signed thereon and the Court orders that said stipulation and order be filed, and that the further hearing of said motions of defendant to dismiss, etc., be stricken from the calendar.

[Title of District Court and Cause.]

STIPULATION AND ORDER

Whereas, in oral argument on November 13, 1945, on the motion of defendant to dismiss, etc., Hon. Ben Harrison, the United States District Judge before whom said matter was argued, stated from the bench to counsel herein that he felt that the first cause of action, if supplemented by copies of the contracts attached to the defendant's motion to dismiss, would not state facts sufficient to constitute a cause of action, and suggested that it would be a tremendous saving of time and expense if the complaint were amended (a) by setting forth copies of the agreements involved in the first count, (b) by eliminating what the Court considered an ambiguity in the complaint, and (c) by the parties entering into a stipulation to eliminate from the pleadings, for the purpose of the appeal only and without prejudice to the rights of the plaintiffs, the second and third causes of action, so as to enable the Court herein to pass upon the sufficiency of the first count on its merits and, further, [39] to make possible a speedy and inexpensive review by appeal if the Court held that the first count was insufficient;

Now, Wherefore, the parties stipulate, without plaintiffs' waiving their rights under the second and third counts and without prejudice to any of plaintiffs' rights thereunder, as follows, to-wit:

1. Plaintiffs will file an amended complaint herein, attaching copies of the forms of contract

in use in 1938, 1939, 1940 and 1941, and omitting the second and third counts.

2. Said omission of the said second and third counts shall be without prejudice to any of the rights of the plaintiffs as to any cause or causes of action included or includible therein by amendment, and shall not be a retraxit or a dismissal with prejudice.

3. Defendant herein waives, for the period of time hereinafter set forth, any and all statutes of limitations now or hereafter applicable to the second or third causes of action or any matters therein set forth or includible therein by amendment, and waives the defense of laches as to the second and third causes of action or any matters therein set forth or includible therein by amendment.

4. Plaintiffs may, at any time prior to six months after the decision on appeal as to the sufficiency of the first count has become final, either amend the amended complaint herein by realleging said second and third counts or any portion of either, or, at any time during said period, file a separate action or actions setting forth said second and third counts or any portion of either, all with the same force and effect as if said second and third counts were continuously included herein as second and third counts from the date of the commencement of this action.

5. The waiver of the statute of limitations and of the defense of laches herein set forth, and the stipulation permitting the amendment of the

amended complaint or the filing of a separate [40]
action or actions hereinabove set forth, shall con-
tinue until six months after the determination on
appeal as to the sufficiency of the first count has
become final.

Read, Considered and Signed this 14 day of
November, 1945.

WOOD, CRUMP, ROGERS &
ARNDT,

By /s/ STANLEY M. ARNDT,
Attorneys for Plaintiffs.

O'MELVENY & MYERS,
By /s/ PIERCE WORKS,
Attorneys for Defendant.

AMERICAN CRYSTAL SUGAR
COMPANY,
Defendant,

(Illegible)
Its President

(Illegible)
Its Secretary

It Is So Ordered.

/s/ BEN HARRISON

United States District Judge.

[Endorsed]: Filed Nov. 26, 1945. [41]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Now come plaintiffs above named and with leave of court first had and obtained, file their Amended Complaint, and for cause of action allege:

I.

The grounds upon which the jurisdiction of the court depends are: (a) Diversity of citizenship; (b) this is an action brought by persons injured in their business and property by reason of acts of the defendant forbidden in the anti-trust laws of the United States, (15 U.S.C. Sec. 15) and brought in a district in which the defendant is found and has an agent.

II.

(a) Plaintiff Mandeville Island Farms, Inc. now is and at all times herein mentioned has been a corporation duly organized and [42] existing under and by virtue of the laws of and a citizen and inhabitant of the State of California, with its principal place of business in Stockton, San Joaquin County, California.

(b) Defendant American Crystal Sugar Company now is and at all times herein mentioned has been a corporation organized and existing under and by virtue of the laws of and a citizen and inhabitant of the State of New Jersey, with its principal office and place of business and executive departments in Denver, Colorado, and engaged in

trade and commerce among the several states of the United States. At all times herein mentioned, said defendant has been and now is qualified to do and doing business in California and in the above entitled district thereof as a foreign corporation and is found in the above entitled district and division of California and in various other parts of California. Its agent designated for service of process under and by virtue of the law of the State of California regarding foreign corporations, is, J. W. Rooney of Oxnard, Ventura County, in the above entitled district and division of California.

(c) Plaintiff Roscoe C. Zuckerman now is and at all times herein mentioned has been a citizen and inhabitant of the State of California and a resident of San Joaquin County in said State.

III.

(a) Plaintiffs Mandeville Island Farms, Inc. and Roscoe C. Zuckerman assert rights herein to relief in respect of or arising out of a series of transactions in which common questions of law and common questions of fact arise and are involved. The said transactions involve agricultural contracts identical in practically all material matters and respects for successive cropping seasons, each involving sugar beets to be grown and grown on Mandeville Island which is a tract of land located in California north of the 36th parallel.

(b) Said Mandeville Island at all times herein mentioned contained large areas of land suitable in composition, drainage, irrigation, location, cli-

mate and transportation facilities for the successful [43] raising of sugar beets suitable for processing into sugar. At all times herein mentioned plaintiffs have had supplies, equipment, tools, personnel, labor, organization, and knowledge adequate for the successful raising on Mandeville Island of sugar beets suitable for processing into raw sugar.

(c) A sugar crop season or year as referred to herein is from August 1st of any particular year to July 31st of the next calendar year and is commonly referred to herein by the year number of the calendar year in which it commences.

IV.

The matter in controversy herein exceeds, exclusive of interest, costs, and attorney fees, the sum of \$3,000.00.

V.

On September 11, 1939, the second world war broke out and thereafter and up to December 7, 1941, the United States was in danger of being drawn into said conflict and was preparing its defenses against its possible entry into said conflict. On December 7, 1941 the Japanese attacked the United States at Pearl Harbor. This was followed by declaration of war between the United States and all the members of the Axis. At all times from September 11, 1939, the sugar beet industry was and now is one of the vital industries of the United States and the growing of sufficient sugar beets to provide for national demands and defense and for the beet sugar stock pile necessary for military

purposes was a matter of national welfare. As a result, the United States Government rationed the use of sugar in the United States and said rationing still continues. The various steps involved in the production and protection of beet sugar, including the growing of sugar beets, the harvesting thereof, the delivering of the beets to the manufacturer, the processing into sugar and the sale and distribution of sugar in interstate commerce to the ultimate consumer, were at all times herein mentioned and now [44] are inextricably intermingled with and directly affected by each other and have an immediate relation on each other. Each of said steps was at all times herein mentioned and now is a part of a transaction that commenced when the ground was prepared for planting the sugar beet seed and was completed when the sugar was used by the ultimate consumer.

VI.

(a) During the crop seasons 1938 to 1942, both inclusive, large acreages of agricultural land in the United States, including that portion of California north of the 36th parallel, Utah, Colorado, Michigan, Idaho, Illinois, Arizona and other states were planted to sugar beets. Said sugar beets, when harvested, were not sold in central markets as were potatoes, onions, corn, grain, fruit and berries, but were produced by growers under contract with manufacturers or processors and immediately upon being harvested were delivered to these manufacturers and taken to their beet sugar refineries

where the sugar beets were manufactured by an elaborate process into raw sugar by the said manufacturers, who thereafter sold the resulting sugar in interstate commerce. Said sugar beets, when harvested, were bulky and semi-perishable and incapable of being transported over long distances or of being stored cheaply or safely for any extended period. Said sugar beets, when ripe, deteriorated rapidly if kept in the ground and not harvested, and it was necessary to harvest them promptly when matured.

(b) The only practical market available to growers of sugar beets in California north of the 36th parallel during said period was sale to one of the three manufacturers that operated one or more beet sugar refineries in said district. Defendant was one of said three manufacturers. The initial outlay for the construction of a beet sugar refinery was so great, the annual upkeep and operating expenses were so large, and the time involved in erecting and equipping a beet sugar refinery so long that no competition from any new [45] refinery could be expected within a period of time shorter than two years, even if the necessary material and equipment priorities could be secured. During all of said period, said three manufacturers of sugar beets had a complete monopoly of the supply of sugar beet seeds and in the manufacture of sugar beets into sugar in California north of the 36th parallel and owned and controlled all sugar beet factories in said area of California which manufactured sugar beets into sugar, and no grower of

sugar beets in California north of the 36th parallel could, during any part of said period, sell sugar beets at a profit except to one of said manufacturers.

(c) The sugar manufactured from said sugar beets was, during all of said period, sold in interstate commerce throughout the United States.

(d) After the raw sugar had been produced, it was impossible to distinguish the manufactured beet sugar manufactured from sugar beets grown in any one part of the United States from that manufactured from sugar beets grown in any other part of the United States.

(e) During said period above referred to, the only sugar beet seeds available in said portion of California were those securable from one of said three manufacturers and the only method of sale of marketable sugar beets used by growers of sugar beets in said area of California was by sale to one of the said three manufacturers under standard form printed contracts prepared by the manufacturers whereby the price to be paid by the manufacturer to the grower of sugar beets was determined for beets of a given sugar content by the net price received from the sale in interstate commerce of the raw sugar manufactured from the sugar beets delivered by the various growers to the manufacturers. A grower who did not enter into one of said standard forms of contract could not get seed from any source and was unable to grow any sugar beets. [46]

VII.

In and by said standard contract, the grower agreed (a) to plant a specified acreage to sugar beets with seed furnished by the manufacturers to the grower at grower's cost, (b) to cultivate said land after the same had been planted and to care for and harvest the sugar beets, and (c) to deliver the beets so harvested to the manufacturers. The manufacturer agreed in and by said contract (a) to accept delivery of said sugar beets from the grower, except that the manufacturer had the right to reject any beets that were diseased, wilted or not suitable for the manufacturer of sugar, (b) to manufacture into sugar the sugar beets accepted by it, (c) to make on the 15th day of each month an advance payment for the sugar beets delivered during the preceding month, based on the estimate made by the manufacturer of the sugar sold and to be sold which had been manufactured from beets produced by the grower and other growers under like contracts, and (d) to make final (in point of time) payment for all beets on or before August 31st of the next crop year, the price to be paid for said beets to be determined by the sugar content of the beets of the individual grower and the net return received from the sale of the manufactured raw sugar in interstate commerce.

VIII.

Prior to the crop season of 1939 and subsequent to the crop season of 1941, the net return from the sale of manufactured raw sugar was determined

under the contracts by the net return from the sale of raw sugar manufactured in beet sugar factories of the particular contracting manufacturer from beets delivered to said manufacturer by the grower and other growers in the same area during the particular crop season, in accordance with the schedule set forth in the standard contract. Attached hereto and marked Exhibit "A" is a copy of the standard contract for the crop season of 1938. It is incorporated herein by reference. But during the crop seasons of [47] 1939, 1940 and 1941, pursuant to the conspiracy hereinafter referred to, the standard printed contract as used by all of said manufacturers provided that the net return used as a basis for the prices to be paid the grower was the average net return of all manufacturers manufacturing sugar north of the 36th parallel in California and not the net return of the particular manufacturer with whom the grower contracted and to whom the beets were delivered and by whom the beets were manufactured into raw sugar.

IX.

Thereupon and some time in 1937 or 1938, at a time unknown to plaintiffs but particularly within the knowledge of defendant, said defendant illegally and wrongfully entered into a conspiracy with each and every one of the other manufacturers of sugar in California whose plants were located north of the 36th parallel to unlawfully monopolize and restrain trade and commerce among the several states and to unlawfully fix prices to be paid the growers

of sugar beets, all in violation of the anti-trust laws of the United States; and as a part of said unlawful conspiracy agreed among themselves to do and did as follows during the crop years 1939, 1940, and 1941.

(a) Each no longer competed against any of the others as to the price to be paid the growers for sugar beets raised in California north of the 36th parallel.

(b) Each paid the same price to growers of sugar beets in California north of the 36th parallel and no more, to-wit: the price determined upon the average net returns from the sale of raw sugar of all sugar manufactured in the plants of said conspirators north of the 36th parallel in California and did not pay the growers upon the net returns from the sale of sugar manufactured in California north of the 36th parallel by the particular manufacturer to whom the particular grower was under contract.

(c) Each no longer competed with any of the other manufacturers of sugar north of the 36th parallel as to efficiency of sales or [48] manufacturing organizations, but instead, and regardless of the efficiency or lack of efficiency of the sales or manufacturing organization of any of the conspirators, and regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, paid all growers of sugar beets in California north of

the 36th parallel, the same price for the same amount of beets of the same sugar content.

(d) Instead of paying the growers of sugar beets a reasonable price for their beets, each of said conspirators furnished seeds to, entered into contracts with and bought seeds only from growers who signed a standard printed form of contract prepared by said manufacturers, identical in all material terms. Farmers contemplating or desirous of growing sugar beets either signed such a contract with one of said conspirators or could not get seeds to plant sugar beets or a market to sell their marketable beets except for hog or cattle feed at a large loss. Attached hereto and marked Exhibits "B", "C" and "D", respectively, are the said standard printed form contracts for the crop years 1939, 1940 and 1941.

(e) Said prices agreed upon by defendant and its co-conspirators to be paid by them and paid by them to plaintiffs and other sugar beet growers in California north of the 36th parallel and set forth in said Exhibits "B", "C" and "D" are not the reasonable prices for sugar beets. The reasonable prices for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in paragraph XIV hereof.

X.

Prior to the 1939 crop season, the various manufacturers of sugar in California north of the 36th parallel, including defendant, competed in interstate commerce with each other as to the perform-

ance, [49] ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales return and decrease expenses and to operate as efficiently as possible and thus to increase the unit return to growers of sugar beets under said standard contract. During the sugar beet crop year of 1938, the net gross receipts of sales of sugar, (less allowances, federal excise taxes, freight to destination, and cash discounts to customers) secured by defendant were 3.641 cents per pound while, at the same time, the like average net gross receipts from the other manufacturers of beet sugar in California north of the 36th parallel were 3.348 cents per pound, or .265 cents less than the net gross receipts secured by defendant. As a result thereof, during the crop year 1938, sugar beet growers in California north of the 36th parallel who had contracted with defendant received on the average from $29\frac{1}{2}$ cents to $52\frac{1}{2}$ cents per ton more for sugar beets delivered to defendant corporation under said standard contract than did growers of identical beets of identical sugar content delivered to the other manufacturers of beet sugar in California north of the 36th parallel.

XI.

During said crop seasons of 1939, 1940 and 1941, as a direct result of said conspiracy, expected and planned by said conspirators, there was no longer any such competition between the conspirators. Plaintiffs are informed and believe and upon such information and belief allege that defendant, as a

result of said conspiracy, did not during said crop seasons of 1939, 1940 and 1941, conduct its interstate operations in as efficient and careful manner as it had prior thereto (when there was no conspiracy but was competition between itself and the other manufacturers), or in as efficient or careful manner as it would have had said conspiracy not existed. As a result thereof, defendant received less in sales returns for its raw sugar and incurred more expense in its operations in said [50] crop years than it would have had competition been free from and unrestrained by said conspiracy and plaintiffs did not receive the reasonable value of their sugar beets.

XII.

As a direct, expected and planned result of said conspiracy, the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed, and, instead of defendant and the other said manufacturers producing and selling raw sugar in interstate commerce with individual enterprise and sagacity, and in competition with each other as they had previously done, they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system which it was and is the purpose of the anti-trust acts to protect and which had existed prior to said conspiracy. As a further direct, expected and planned result of said conspiracy, any and all incentive that theretofore existed for defendant and the other said manufacturers to be efficient and economical and to develop

individual enterprise and sagacity, disappeared, and, during said crop seasons, said three manufacturers operated in so far as the growers were concerned, as if they were one corporation owning and controlling all sugar beet factories in California north of the 36th parallel but with three completely separate overheads and with none of the efficiency that consolidation into one corporation might bring.

XIII.

Said conspiracy continued throughout the crop years of 1939, 1940 and 1941, and until August 31, 1942, when the last payment was made under the 1941 standard contract and said conspiracy has been continued thereafter up to the present time in so far as defendant and each of its co-conspirators still refuse and will not make payments to any of the growers other than in accordance with the method agreed upon in said conspiracy as above set forth, and will not furnish any of the growers the individual, as contrasted with [51] the pooled, sales return of the particular manufacturer with whom said grower dealt. Plaintiffs herein demanded in writing such information of defendant but defendant refused to and has not furnished the same.

XIV.

(a) Defendant and the other manufacturers of sugar referred to herein were at all times herein mentioned growers of sugar beets and "producers on the farm" of sugar beets and "processors of sugar beets" as those respective phrases are and

were used in the Sugar Act of 1937. Plaintiff is informed and believes and upon such information alleges that each of said persons received payments for the crop years 1939, 1940, and 1941 from the Secretary of Agriculture in accordance with Sec. 301 of the said Sugar Act. (7 U.S.C. 1131). Claude R. Wickard was at all times mentioned in this paragraph the duly appointed, qualified and acting Secretary of Agriculture. On December 2, 1940, said Secretary of Agriculture, after due notice to all interested parties (including defendant and all other manufacturers of sugar in California) and after public hearings duly held and after investigations duly made, did pursuant to Section 301d of said Sugar Act (7 U.S.C. 1131 (d)) make the following determination of the fair and reasonable price for the 1940 and 1941 crops of sugar: (5 Fed. Reg. 5231):

"Fair and reasonable prices for the 1940 and 1941 crops of sugar beets. The requirements of subsection (d) of section 301 of the Sugar Act of 1937, as amended, shall be deemed to have been fulfilled with respect to the 1940 and 1941 California crops of sugar beets if the producer-processor shall have paid rates for any sugar beets processed by him equal to those provided in the following schedule: [52]

Percentum sucrose in beets	Average net return per 100 lbs. of sugar					
	\$4.00	\$3.75	\$3.50	\$3.25	\$3.00	
		Price per ton of sugar beets				
19.....	\$7.12	\$6.65	\$6.18	\$5.70	\$5.22	
18.....	6.66	6.21	5.76	5.31	4.86	
17.....	6.20	5.78	5.36	4.93	4.50	
16.....	5.76	5.36	4.96	4.56	4.16	
15.....	5.32	4.95	4.58	4.20	3.82	
14.....	4.90	4.55	4.20	3.85	3.50	

(Payments upon intermediate sugar prices and sugar content, or sugar prices or sugar content, higher or lower than those shown in the foregoing schedule, shall be on the same proportionate basis.)

Provided, however that in no event shall the average net return used as the settlement basis be determined by averaging the net proceeds realized from the sale of sugar by more than one producer-processor: And provided further, that a haulage allowance at a rate not less than 2½ cents per mile per ton shall be granted to growers who perform such service in areas in which allowances have been agreed upon between producer-processors and growers.

(b) No appeal has been taken from said determination and any time to appeal has expired; it has not been modified, abrogated, cancelled, or withdrawn, but has become final. The fair and reasonable prices for sugar beets for the 1940 and 1941 California crops are as set forth in said determination.

(c) The said determination of the Secretary of Agriculture under the Sugar Act of 1937 as to the

fair and reasonable prices for the 1940 and 1941 California crops of sugar beets was made December 21, 1940, and was published in the Federal Register on December 24, 1940, as aforesaid, but, nevertheless, defendant and its said co-conspirators, each of whom took part in the said hearings held by the Secretary of Agriculture, and each of whom well knew of the [53] determination, persisted thereafter in their said conspiracy and would not buy beets from growers in California north of the 36th parallel except under the terms and conditions set forth in said standard agreement.

XV.

On November 14, 1938, defendant and plaintiff Mandeville Island Farms, Inc., entered into one of defendant's standard form contracts for the 1939 crop season under which defendant promised to pay said plaintiff on August 31, 1940, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1939 delivered to defendant 22,355.6 tons of sugar beets of an average sugar content of 18.25% from Mandeville Island, which beets were accepted by defendant and manufactured by it into sugar. Said plaintiff does not know when said sugar beets were manufactured into sugar by defendant. Said information is particularly within the knowledge of defendant. Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XVI.

On December 29, 1939, defendant and plaintiff Mandeville Island Farms, Inc., entered into one of defendant's standard form contracts for the 1940 crop season under which defendant promised to pay said plaintiff on August 31, 1941, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1940 delivered to defendant 25,430.3 tons of sugar beets of an average sugar content of 15.55% from said Mandeville Island, which beets were accepted by defendant and manufactured into sugar. Said plaintiff does not know when said beets were manufactured into sugar by defendant. Said information [54] is particularly within the knowledge of defendant. Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XVII.

On June 23, 1941, defendant and plaintiff Roscoe C. Zuckerman entered into one of defendant's standard form contracts for the 1941 crop season under which defendant promised to pay plaintiff on August 31, 1942, for the sugar beets delivered thereunder. Said plaintiff performed each and every term, condition and covenant on its part to be performed in said contract and during the crop year 1941 delivered to defendant 14,144.7 tons of sugar beets of an average sugar content of 15.47% from said Mandeville Island, which beets were ac-

cepted by defendant and manufactured by it into sugar. Said plaintiff does not know when said sugar beets were manufactured into sugar by defendant. Said information is particularly within the knowledge of defendant. Said plaintiff has requested said information but defendant has refused to furnish and has not furnished the same to plaintiff.

XVIII.

Defendant paid plaintiffs for their 1939, 1940 and 1941 crops of sugar beets on August 31 of 1940, 1941 and 1942, respectively, but in carrying out said conspiracy and as a part and parcel thereof, said defendant paid plaintiff on said respective dates, not upon the price secured in interstate commerce from sugar manufactured from beets delivered by plaintiff and other growers located north of the 36th parallel to the refineries of defendant located north of the 36th parallel; as defendant had paid growers prior to the 1939 crop year and not upon the prices and the bases determined by the Secretary of Agriculture to be fair and reasonable as aforesaid; but paid them in accordance with the average net return secured in interstate commerce for sugar by all manufacturers of beet sugar with refineries [55] in California north of the 36th parallel and in accordance with the schedule set forth in the said standard contracts. Plaintiffs are informed and believe and upon such information and belief allege that the net sales return secured from sugar sold by defendant was greater than the average secured by all manufacturers of sugar north

of the 36th parallel. Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, plaintiff Mandeville Island Farms, Inc., would have received at least \$105,014.60 more and plaintiff Roscoe C. Zuckerman would have received at least \$37,397.38 more than each did receive under said contracts and said plaintiffs, respectively, sustained damages accordingly, none of which damage has been paid. The exact amount that plaintiffs were damaged, as aforesaid, can only be determined by an accounting in that defendant has refused all requests and demands of plaintiffs for information on which plaintiffs could determine and could herein plead the specific amounts due to plaintiffs. Plaintiffs are entitled by virtue of paragraph 15 of the anti-trust laws of the United States (15 U.S.C. Sec. 15) to have such damages trebled.

XIX.

By reason of the foregoing acts of the defendant and its said conspirators, interstate commerce in sugar was illegally restrained, competition therein was not only substantially lessened but was destroyed, the price of sugar beets was illegally fixed, and an illegal monopoly was established, all in violation of the anti-trust laws of the United States, to the damage of plaintiffs as aforesaid.

XX.

Plaintiffs, in order to enforce their rights against

defendant, employed the services of attorneys at law and, under the anti-trust laws of the United States (15 U.S.C. Sec. 15), are entitled to [56] reasonable attorneys' fees, the amount of which will depend upon the amount of work necessary to be performed herein by said attorneys.

XXI.

From October 10, 1942, to June 30, 1945, the statute of limitations applicable to the within set forth violations of the anti-trust laws of the United States was suspended by reason of the amendment of 16 U.S.C. Sec. 16, passed October 10, 1942, (Acts of Congress October 10, 1942, Ch. 589; 56 Stat. 781, U.S.C. 1940 ed., Sup. IV, p. 185; 15 U.S.C.A. 1944 Cum. An. P. P. Title 15, Sec. 16, p. 76), which was in full force and effect between October 10, 1942, and June 30, 1945.

Wherefore, plaintiffs pray judgment against defendant as follows:

1. That defendant be required to account to plaintiffs in connection with all sugar beets delivered by plaintiffs to defendant during the crop years 1939, 1940, and 1941, and for all sugar manufactured therefrom and sold by said defendant.
2. That plaintiff Mandeville Island Farms, Inc., have judgment for the sum found to be due it by said accounting and that the amount so found due be trebled.
3. That plaintiff Roscoe C. Zuckerman have judgment for the sum found to be due him by said

accounting and that the amount so found due be trebled.

4. That plaintiff Mandeville Island Farms, Inc., have judgment against the defendant for \$315,043.80 with interest from August 31, 1941, together with attorney fees in such sum as the court may deem reasonable.

5. That plaintiff Roscoe C. Zuckerman have judgment against the defendant for \$112,192.14 with interest from August 31, 1941, together with attorney fees in such sum as the court may deem [57] reasonable.

6. That plaintiffs have judgment for their costs herein involved and attorney fees.

7. That plaintiffs have such other and further relief as may be fit and proper in the premises.

WOOD, CRUMP, ROGERS &

ARNDT

/s/ STANLEY M. ARNDT

Attorneys for Plaintiffs [58]

EXHIBIT A

Form 3549-D-1000

MEMORANDUM OF AGREEMENT—
SEASON 1938

Between Grower

AND

AMERICAN CRYSTAL SUGAR COMPANY
CLARKSBURG FACTORY

For delivery of Sugar Beets at.....

Witnesseth, that for and in consideration of the mutual covenants and payments hereinafter set out, the respective parties hereto mutually undertake and agree as follows, to-wit:

1. The Grower will prepare land for, plant, block, thin, cultivate, irrigate, harvest and deliver during the season of 1938, in compliance with the directions of The Company, as given from time to time, acres of sugar beets; to be grown on the following described land, to-wit:

.....State of California.

2. The seed to be used in growing said beets shall be furnished by The Company for the price of fourteen (14) cents per pound, which The Grower agrees to pay. Seed furnished by The Company shall not be planted upon any land not contracted to The Com-

pany. Any seed furnished by The Company and not planted shall be returned in good order to The Company, at the end of the planting season, and The Grower credited therefor. No credit will be given for seed not returned prior to July 1, 1938.

3. The Grower agrees that beets hereunder shall not be irrigated after July 15, 1938, except by written permission of The Company.

4. The grower agrees that at his own expense he will harvest and deliver to the Company all beets grown by him, said delivery to be made at such times and in such quantities and to such place or places as may be designated by the Company. All beets delivered hereunder shall be properly topped, that is to say, the tops shall be squarely cut off at the base of the bottom leaf in case of medium or small size beets, and the crown trimmed up from the base of the bottom leaf in the case of large beets, and shall be free from stones, trash, excess dirt, and foreign substances liable to interfere with factory work, and shall be subject to proper deductions for tare. A distinct evidence of leaf scar is to be left after top tare is taken.

5. The Company has the privilege at various times during the growing and harvesting season to ascertain the quality of the beets grown under this contract by causing such beets to be sampled and polarized. The Company has the option of rejecting any beets where the above mentioned conditions have not been properly complied with, also any diseased or wilted beets, beets of less than 12% sugar,

or less than 80% purity, or beets that are not suitable in the judgment of The Company for the manufacture of sugar, anything in this contract to the contrary notwithstanding.

In no event shall the Company be liable to the Grower for partial or complete failure of crop, or for any injury or damages to beets.

6. All sound beets grown in accordance with and under this contract shall be bought by the Company and paid for by it according to the following terms and schedule of prices:

The price per ton (2,000 pounds) for beets delivered hereunder to the Company shall be determined upon the average net returns (said net returns being defined in Paragraph No. 7 hereof) per one hundred pounds of sugar received by The Company from sugar manufactured at its Clarksburg Factory, and sold by The Company during the period of twelve months commencing August 1, 1938, and based upon The Company's test of the sugar content of the individual grower's beets in accordance with the following schedule:

PERCENTAGE SUGAR IN BEETS

Net Price Received For Sugar	23%	22%	21%	20%	19%	18%	17%	16%	15%	14%	13%
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VALUE OF ONE TON OF BEETS EXPRESSED IN DOLLARS AND CENTS

5.00	10.71	10.24	9.77	9.31	8.74	8.28	7.82	7.28	6.72	6.20	5.69
4.75	10.21	9.76	9.32	8.87	8.33	7.89	7.46	6.94	6.41	5.91	5.42
4.50	9.70	9.28	8.86	8.44	7.92	7.51	7.09	6.60	6.09	5.62	5.15
4.25	9.00	8.61	8.22	7.83	7.35	6.97	6.58	6.12	5.65	5.21	4.78
4.00	8.30	7.94	7.58	7.22	6.78	6.42	6.07	5.64	5.21	4.81	4.41
3.75	7.60	7.27	6.94	6.61	6.21	5.88	5.56	5.17	4.77	4.40	4.04
3.50	7.00	6.70	6.39	6.09	5.72	5.42	5.12	4.76	4.40	4.05	3.72
3.25	6.50	6.22	5.94	5.66	5.31	5.03	4.75	4.42	4.08	3.77	3.45

Intermediate sugar prices and beet tests in the same relative proportion as reflected in the interval in which such fluctuations occur. If sugar prices or sugar contents are higher or lower than those shown in the foregoing schedule, the settlement figure for such beets shall be increased or decreased according to the foregoing formula, using the immediately succeeding or preceding interval, as the case may be, as the basis for calculation, provided also that if the net return for sugar should fall below \$3.25 per hundred, in such event the price per ton of beets hereinbefore fixed by this paragraph shall be further decreased in the proportion of one per cent (1%) for each five cents (5c) of decrease in the net return per one hundred pounds of sugar below \$3.25.

Settlements will be made as follows:

For all beets delivered up to and including the end of any month, settlement will be made on or before the 15th of the succeeding month. The foregoing settlements will be made at as high an amount per ton as may be justified in the judgment of the Company based upon the Company's test of sugar content of the individual grower's beets and the Company's estimate of the net returns to be received by it for sugar sold during the twelve months period beginning August 1, 1938. Further settlements will be made on the aforesaid price of beets from time to time and in such amounts as the Company may deem to be justified by market conditions and quantity of sugar sold. Final settlement for all beets delivered hereunder shall be made in accordance

with the terms of this contract not later than August 31, 1939.

7. The net return on sugar sold as aforesaid during said period shall be determined by deducting, from the gross sales price, selling expenses directly applicable to sugar consisting of freight, discount, brokerage, storage, shipping and handling, loss and damage, insurance, advertising, salaries, traveling expenses and sundry expenses, and also any expenses or taxes occasioned by act of law or State or Federal regulation. The Company will furnish for the inspection of growers a certified statement by certified public accountants, not connected with The Company, of the net receipts from sugar sold, in accordance with this contract.

8. Any advances by the Company to the Grower either in seed, money, or otherwise, shall constitute a debt from the Grower to the Company which the Company shall have the right to collect as in the case of any other contractual obligation. The Company shall have the right, at its option, to treat any such advances as part payment for beets grown and delivered under this contract. Any such indebtedness which is due and payable or which may hereafter become due and payable from the Grower to The Company shall be, become and remain a first and prior lien on the crop of sugar beets to be grown hereunder and shall be deducted by The Company from any initial or subsequent payments from The Company to The Grower which shall become due hereunder, or under any subsequent beet contract be-

tween the Company and the Grower. If the beet crop to be grown hereunder is grown on leased land, payments to become due hereunder from the Company to the Grower shall be payable jointly to the Grower and the landlord unless the landlord shall have previously filed with the Company his written release in form satisfactory to the Company

9. The Grower may, at his own expense, have representatives (weighmen, taremen, and chemists) in scale house, tare room, and/or laboratory to inspect weights and work done, such representatives to be experienced in the line of work performed and satisfactory to the Company.

10. It is understood and agreed that if any governmental authority shall establish any restriction, allotment, or quota upon the growing, production, or processing of beets, or the output, transportation, or sale of beet sugar, then the Company may reduce to the extent which it deems necessary the quantity of beets herein contracted for, and shall be obligated to purchase only such reduced quantity.

11. Fire, strikes, accidents, acts of God and of the public enemy, or other causes beyond the control of the parties which prevent the Grower from the performance of this contract or the Company from utilizing the beets contracted for in the manufacture of sugar therefrom, shall excuse the respective parties hereto from the performance of this contract.

12. The Company, at its sole option and election, unless notified in writing by the Grower prior

to July 1, 1938, not to make such deduction, is authorized to deduct from any monies coming due for beets delivered under this contract not to exceed the sum of two cents (2c). per ton on the Grower's share of the beets delivered by the Grower hereunder, and to pay such amount to the Central California Beet Growers Association, Ltd.

13. No agent of The Company is authorized to make any alterations, erasures or additions to this printed form of contract.

14. This agreement shall be binding upon both The Grower, his heirs, legal representatives and assigns, and upon The Company, its successors and assigns, and shall not be transferable by The Grower without the written consent of The Company, its successors and assigns.

Executed in duplicate originals this
day of, 193.....

AMERICAN CRYSTAL SUGAR COMPANY

By

..... Grower

..... Grower

[Printer's Note: Exhibits "B", "C" and "D" are similar to Exhibits "A", "B" and "C", set out in full at pages 36 to 59 inclusive of this Record.]

[Endorsed]: Filed Dec. 1, 1945.

[Title of District Court and Cause.]

**NOTICE OF MOTION TO DISMISS OR IN
THE ALTERNATIVE TO STRIKE FROM
AMENDED COMPLAINT**

To Plaintiffs in the above entitled action and to
Messrs. Wood, Crump, Rogers & Arndt, their
Attorneys:

Please Take Notice that defendant above named
will, on Monday, December 17, 1945, at the hour of
10:00 o'clock a.m., or as soon thereafter as counsel
may be heard, move the above entitled court, in
Court Room No. 6 thereof, in the United States
Court House and Post Office Building, Los Angeles,
the Honorable Ben Harrison, Judge Presiding, as
follows:

1. To dismiss the action because the amended
complaint [63] fails to state a claim against de-
fendant upon which relief can be granted.

2. To dismiss the action because the amended
complaint fails to state a claim against defendant
upon which relief can be granted under the anti-
trust laws of the United States, or any thereof.

3. To dismiss the action in so far as it purports
to state a cause of action under any California
statute because the same is barred by the provi-
sions of Section 359 of the Code of Civil Procedure
of California.

4. In the alternative, and in the event the above
motion to dismiss is for any reason denied, to strike
from the amended complaint, because immaterial,
the following parts or portions thereof:

a. The whole of paragraph numbered XIV, pages 11-13.

b. That part of paragraph IX appearing on page 8 thereof and reading as follows:

"The reasonable prices for sugar beets for the crop years 1940 and 1941 were as determined by the Secretary of Agriculture and set forth in paragraph XIV hereof."

Dated: December 7, 1945.

O'MELVENY & MYERS
PIERCE WORKS
JOHN WHYTE

/s/ PIERCE WORKS

Attorneys for Defendant

[Endorsed]: Filed Dec. 8, 1945. [64]

At a stated term, to-wit: The September Term, A.D., 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 17th day of December in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable Ben Harrison, District Judge.

[Title of Cause.]

This cause coming on for hearing motions of defendant to dismiss, or in the alternative, to strike from the Amended Complaint, pursuant to notice,

motions, and points and authorities filed December 8, 1945; Stanley Arndt, Esq., appearing as counsel for the plaintiff; Pierce Works, Esq., appearing as counsel for the defendant; counsel for the parties state that they have nothing further to present. The Court orders that said motions of defendant stand submitted. [65]

At a stated term, to-wit: The September Term, A.D., 1945, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 9th day of January in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Ben Harrison, District Judge.

[Title of Cause.]

This cause having been heretofore heard and submitted on motion of the defendant to dismiss, etc., filed December 8, 1945, and counsel having filed memoranda of points and authorities, and the Court having duly considered the Amended Complaint, briefs of counsel, and the law applicable, and being fully advised in the premises, now hands down and orders filed its Opinion and Order, and in accordance therewith orders judgment of dismissal and directs the defendant to prepare and present proposed judgment in accordance with said opinion for signature. Opinion is filed. [66]

[Title of District Court and Cause.]

OPINION

Appearances: Wood, Crump, Rogers & Arndt, Esqs., 458 South Spring Street, Los Angeles 13, California, Attorneys for Plaintiffs. O'Melveny & Myers, Esqs., 433 South Spring Street, Los Angeles 13, California, Attorneys for Defendant.

This action comes before me on a motion to dismiss the amended complaint of certain sugar beet growers, who are seeking treble damages under the Anti-Trust Act (Secs. 1 to 7, Title 15 USCA), from the defendant sugar refiner, alleging a conspiracy, the effect of which prevented the sale of sugar beets on a free and open competitive market. The motion to dismiss is based on the ground that the raising of sugar beets has no direct effect upon interstate commerce and therefore does not come within the purview of the Anti-Trust Act.

The amended complaint alleges in effect that the plaintiffs are growers of sugar beets north of the 36th parallel in California and the only outlets for their products are three certain sugar refineries located in the same area within the State of California; that the sugar [67] refineries in said area entered into a conspiracy in violation of Section 1, Title 15 USCA, whereby each refiner agreed to pay the growers the same price for sugar beets and entered into identical contracts with all the growers of said area. The identical contracts among other things provided:

2. The seed to be used in growing said beets

shall be furnished by the Company for the price of fourteen cents (14 cents) per pound, which the grower agrees to pay. Seed furnished by the company shall not be planted upon any land not contracted to the Company. Any seed furnished by the Company and not planted shall be returned in good order to the Company, at the end of the planting season, and the Grower credited therefor. No credit will be given for seed not returned prior to July 1, 1940.

5. All sound beets grown in accordance with and under this contract shall be bought by the Company and paid for by it according to the following terms and schedule of prices:

—The price per ton (2,000 pounds) for beets delivered hereunder to the Company shall be determined upon the average net returns (said net returns being defined in Paragraph No. 6 hereof) received for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of twelve months commencing August 1, 1940, and based upon the Company's test of sugar content of the individual grower's beets in accordance with the following schedule: (Schedule omitted).

•It is further alleged that prior to the said conspiracy the contracts of the defendant provided that the price paid for sugar beets would be based upon the net returns of the defendant, instead of the average net returns of all the sugar refineries in said area; that during the crop years complained of the defendant received .265 cents per pound more

for its raw sugar than the other refineries and as a result of said conspiracy the plaintiffs have received less for their sugar beets than they would have received except for said conspiracy.

Plaintiffs further complain that they failed to receive the fair market value for said sugar beets in accordance with the fair market price fixed by the Secretary of Agriculture; that the difference actually received by them and the price fixed by the Secretary of [68] Agriculture represents the damages suffered by them and under the provisions of the Anti-Trust Act said damages should be trebled.

From the complaint it appears that the net result of the conspiracy is that all beet growers in said area received the same price for their sugar beets and, while the plaintiffs may have suffered a detriment, growers delivering their beets to other sugar refineries received an advantage.

The complaint coupled with the contracts attached thereto as exhibits clearly establish that the sugar refineries were working in concert in the purchase of sugar beets from the grower plaintiffs. This brings us to the main question of law raised by the motion to dismiss.

The defendant contends that the raising of the beets, the sale to the refineries for the purpose of processing the same into sugar is an intrastate matter and beyond the reach of the Anti-Trust Act. With this contention I agree.

In the case of *Coe v. Town of Errol*, 116 U.S. 517 at page 526, 6 S. Ct. 475, the court stated:

"There must be a point of time when they cease

to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial regulation, and that moment seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected, and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports; nor are they in process of exportation; nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin; but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of their being intended for exportation, but taxed, without any discrimination, in the usual way and manner in which such property is taxed in the state." [69]

✓ To the same effect see *Crescent Cotton Oil Company v. State of Mississippi*, 257 U. S. 129, 42 S. Ct. 42, 66 L. Ed. 166.

The case closest in point is *Dothan Oil Mill Co. vs. Espy*, 127 So. Rep. 179, 182 (Ala.), wherein the court had before it the identical question now before this court. The court covered the question in the following language:

"We are not of opinion, however, that the business of buying cotton seed, confined wholly to the state, to be crushed and manufactured into oil and other products, in such state, constitutes interstate commerce, within the scope and purpose of said act or within the sense of the Sherman and Clayton Acts (15 USCA §§1-7, 15 and sections 12-27, 44) which confer on the federal courts exclusive jurisdiction to enforce said acts, though some of the manufactured products may eventually find their way into and become commodities of interstate commerce. 'The fact, of itself, than an article when in the process of manufacture is intended for export to another state does not render it an article of interstate commerce.' *Crescent Cotton Oil Co. v. State of Mississippi*, 257 U. S. 129, 42 S. Ct. 42, 44, 66 L. Ed. 166; *Coe v. Errol*, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715; *New York Central R. R. Co. v. Mohney*, 252 U. S. 152, 40 S. Ct. 287, 64 L. Ed. 502, 9 A.L.R. 496.

"Though, under the provisions of section 26, tit. 15, of the United States Code Annotated, a private individual may maintain a suit to enjoin acts interfering with interstate commerce, in a proper case, the acts complained of must be immediately and directly against such commerce. *Gable v. Vonnegut Mach. Co. et al.* (C.C.A.) 274 F. 66; *Anderson v. Shipowners' Association of Pacific Coast*, 272 U. S. 359, 47 S. Ct. 125, 71 L. Ed. 298.

"These observations are sufficient to justify a denial of appellants' contention that, on the case made by the bill, the Federal District Court, only,

has jurisdiction to grant the relief prayed. *Home Telephone Co. v. Michigan R. R. Commission*, 174 Mich. 219, 140 N. W. 496 "

In *Utah-Idaho Sugar Co. v. Federal Trade Commission*, 22 F. (2d) 122 (8th Cir.) the court had before it for consideration the very subject matter involved in this litigation, namely, sugar and sugar beets. The court therein stated: [70]

"In the present case there is no commerce to obstruct until the beets are manufactured into sugar and such sugar has been placed in transport. The argument is however, as stated above, that the acts here cut off at the source such commerce. It is only such acts as directly interfere with commerce which come under the federal jurisdiction. The line must be drawn somewhere, else all jurisdiction in trade or production would become federal. Hence Congress has not jurisdiction of such acts as only indirectly or remotely affect commerce. In the instant case if interference with the production and manufacture into sugar of beets is an obstruction to a later or unborn commerce in sugar to be made from the beets, one who intrastate sold defective beet seed, thus preventing the production of beets to be manufactured into sugar, would be in commerce, or one who sold fertilizer to raise the seed to plant the beets to make the sugar to be shipped in commerce would be in commerce.

"To the cases cited by Commissioner Van Fleet and Gaskill on the proposition that the production of sugar beets and their manufacture into sugar does not constitute interstate commerce, may be

added the later case of *United Leather Worker's International Union Local Lodge or Union No. 66 v. Herbert & Meisel Trunk Co.*, 265 U. S. 457, 462, 44 S. Ct. 623, 68 L. Ed. 1104, 33 A.L.R. 566, and the cases there cited. We think it clear that the conduct on which the Commission's findings were made went no farther than an interference with the raising of sugar beets and the manufacture of sugar therefrom, and that those transactions were beyond the power and outside the scope of regulation given to the Commission by the Act of Congress under which its order was made."

In the case of *Parker, Director of Agriculture, et al., vs. Brown*, 317 U. S. 341, 361, 63 S. Ct. 307, 87 L. Ed. 315, arising in our own district, we find some pertinent language wherein the court stated:

"All of these cases proceed on the ground that the taxation or regulation involved, however drastically it may affect interstate commerce, is nevertheless not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs. Applying that test, the regulation here controls the disposition, including the sale and purchase, of raisins before they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate before the raisins are [71] ready for shipment in interstate commerce.

"It is for this reason that the present case is to be distinguished from *Lemke v. Farmers Grain Co.*, 258 U. S. 50, and *Shafer v. Farmers Grain Co.*, 268

U. S. 189, on which appellee relies. There the state regulation held invalid was of the business of those who purchased grain within the state for immediate shipment out of it. The Court was of opinion that the purchase of the wheat for shipment out of the state without resale or processing was a part of the interstate commerce. Compare *Chassaniol v. Greenwood*, 291 U. S. 584."

It appears clear that the decisions of our courts have consistently held throughout the life of the Anti-Trust Act that products of the farm which are subsequently manufactured or processed into articles of commerce are beyond the reach of said Act.

I am further of the opinion that the plaintiffs have precluded a recovery on the ground that they are in effect co-conspirators. When they entered into the contracts with the refiners, they joined the conspiracy and further the object of the same. The contracts were entered into before the planting of the seed and when they agreed and became a party to the fixing of the prices to be received by the growers, they became a party to the conspiracy. Under such circumstances they are precluded from any recovery. 19 R.C.L. p. 28; *Connolly et al. v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679; *Harriman et al. v. Northern Securities Co.*, 197 U. S. 244, 25 S. Ct. 493, 49 L. Ed. 739; *Bishop v. American Preservers Co. et al.* 105 F. 845; *Bluefields S. B. Co. Ltd., v. United Fruit Co.*, 243 F. 1; *Maltz v. Sax et al.*, 134 F. (2d) 2; *Northwestern Oil Co. v. Socony Vacuum Oil Co., Inc., et al.*, 138 F. (2d) 967.

Defendant is entitled to judgment of dismissal and is directed to submit to me proposed judgment in accordance with this opinion.

Dated: This 9th day of January, 1946.

/s/ BEN HARRISON

Judge

[Endorsed]: Filed Jan. 9, 1946. [72]

In the District Court of the United States, Southern
District of California, Central Division

No. 4613-BH

MANDEVILLE ISLAND FARMS, INC., a Corporation, and ROSCOE C. ZUCKERMAN,
Plaintiffs,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a Corporation,
Defendant.

**ORDER GRANTING MOTION TO DISMISS
AND JUDGMENT OF DISMISSAL**

(Ordered, adjudged and decreed that the action be
and the same hereby is dismissed)

The defendant herein having duly moved to dismiss the above entitled action and said motion having been duly argued and submitted,

It Is Ordered that said motion be and the same hereby is granted, wherefore:

It Is Ordered, Adjudged and Decreed that said action be and the same hereby is dismissed.

Dated January 14, 1946.

/s/ BEN HARRISON

Judge

Approved as to form pursuant to Rule 7(a).

WOOD, CRUMP, ROGERS &
ARNDT

By STANLEY M. ARNDT

Attorneys for Plaintiffs

Judgment entered Jan. 14, 1946. Docketed Jan. 14, 1946. Book 36, Page 454.

EDMUND L. SMITH

Clerk

By L. B. FIGG

Deputy

[Endorsed]: Filed Jan. 14, 1946. [73]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT
COURT OF APPEALS

Notice Is Hereby Given that Mandeville Island Farms, Inc., a corporation, and Roscoe C. Zucker-
man, plaintiffs above named, hereby appeal to the
Circuit Court of Appeals for the Ninth Circuit
from the Order heretofore made and entered herein

on or about January 14, 1946, granting the motion of defendant, American Crystal Sugar Company, a corporation, to dismiss the amended complaint herein and from the judgment entered in this action on or about January 14, 1946, ordering, adjudging and decreeing that the within action "be and the same hereby is dismissed" and from that certain Order and Judgment entitled "Order Granting Motion to Dismiss and Judgment of Dismissal" entered in this action on or about January 14, 1946.

Dated, January 24, 1946.

WOOD, CRUMP, ROGERS &
ARNDT

/s/ By STANLEY M. ARNDT

Attorneys for Appellants Mandeville Island Farms, Inc., a Corporation, and Roscoe C. Zuckerman

[Endorsed]: Filed Jan. 29, 1946. [75]

[Title of District Court and Cause.]

STATEMENT OF THE POINTS UPON
WHICH APPELLANTS RELY

Now come Mandeville Island Farms, Inc., and Roscoe C. Zuckerman, plaintiffs and appellants, and, pursuant to Rule 75(d), set forth a concise statement of the points which they intend to rely on appeal, as follows:

1. The District Court erred in granting defendant's "Motion to Dismiss or in the Alternative to Strike from Amended Complaint."

2. The District Court erred in rendering judgment of dismissal in favor defendant, American

Crystal Sugar Company, and against plaintiffs, Mandeville Island Farms, Inc., and Roscoe C. Zuckerman, which judgment was entered and noted in the Civil Docket on the 14th day of January, 1946.

3. The District Court erred in making and rendering the [76] order and judgment herein entitled "Order Granting Motion to Dismiss and Judgment of Dismissal" and causing the same to be entered.

Dated, January 29, 1946.

WOOD, CRUMP, ROGERS &
ARNDT

/s/ By STANLEY M. ARNDT

Attorneys for Appellants Mandeville Island Farms, Inc., a Corporation, and Roscoe C. Zuckerman

[Endorsed]: Filed Jan. 29, 1946. [77]

[Title of District Court and Cause.]

**DESIGNATION OF RECORD ON APPEAL
PURSUANT TO RULE 75(a) RULES OF
CIVIL PROCEDURE**

Now come Mandeville Island Farms, Inc., and Roscoe C. Zuckerman, plaintiffs and appellants herein and, pursuant to Rule 75(a), designate the record on appeal as follows, to-wit:

All pleadings filed herein (excluding the points and authorities of the various parties), all stipulations, all judgments and orders of Court, including that certain order and judgment entitled Order Granting Motion to Dismiss and Judgment of Dismissal, the Notice of Appeal, this Designation, the

Statement of the Points upon which Appellants Rely, and any documents filed by respondent in response to any of the above documents or in connection with this appeal, and all entries in the Clerk's docket regarding or affecting this cause. [81]

Dated, January 29, 1946.

WOOD, CRUMP, ROGERS &
ARNDT

/s/ By STANLEY M. ARNDT

Attorneys for Appellants Mandeville Island Farms,
Inc., a Corporation, and Roscoe C. Zuckerman
(Acknowledgment of Service.)

[Endorsed]: Filed Jan. 29, 1946. [82]

In the District Court of the United States, Southern
District of California, Central Division

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 83, inclusive, contain full, true and correct copies of Complaint for an Accounting, Damages Under the Anti-Trust Laws, etc.; Notice of Motion to Dismiss or in the Alternative to Strike from Complaint or for a More Definite Statement or for a Bill of Particulars; Minute Orders Entered September 20, 1945; October 31, 1945, November 13, 1945, November 19, 1945, and November 26, 1945, respectively; Stipulation and Order: Amended Complaint; Notice of Motion to Dismiss or in the Alternative to Strike

from Amended Complaint; Minute Orders Entered December 17, 1945, and January 9, 1946, respectively; Opinion; Order Granting Motion to Dismiss and Judgment of Dismissal; Notice of Appeal; Statement of Points upon which Appellants Rely; Docket Entries and Designation of Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$23.55 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 28th day of February, 1946.

[Seal]

EDMUND L. SMITH

Clerk

By THEODORE HOCKE

Chief Deputy Clerk

[Endorsed]: No. 11266. United States Circuit Court of Appeals for the Ninth Circuit. Mandeville Island Farms, Inc., a Corporation, and Roscoe C. Zuckerman, Appellants, vs. American Crystal Sugar Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed March 4, 1946.

/s/ PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit

United States Circuit Court of Appeals
For the Ninth Circuit

No. 11266

MANDEVILLE ISLAND FARMS, INC., a Corporation,
and **ROSCOE C. ZUCKERMAN,**
Appellants,
Plaintiffs below)

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a Corporation,
Appellee.
(Defendant below)

**STATEMENT OF THE POINTS ON WHICH
APPELLANTS INTEND TO RELY ON
THE APPEAL AND DESIGNATION OF
THE PARTS OF THE RECORD WHICH
APPELLANTS THINK NECESSARY FOR
THE CONSIDERATION THEREOF**

Now come appellants and, pursuant to subdivision 6 of rule 19 of the rules of the above entitled Court, set forth a concise statement of the points upon which appellants intend to rely on this appeal:

1. The District Court erred in granting defendant's "Motion to Dismiss or in the Alternative to Strike from Amended Complaint."

2. The District Court erred in rendering judgment of dismissal in favor of defendant, American Crystal Sugar Company, and against plaintiffs,

Mandeville Island Farms, Inc., and Roscoe C. Zuckerman, which judgment was entered and noted in the Civil Docket on the 14th day of January, 1946.

3. The District Court erred in making and rendering the order and judgment herein entitled "Order Granting Motion to Dismiss and Judgment of Dismissal" and causing the same to be entered.

Appellants designate the following parts of the record which appellants think necessary for the consideration on appeal, as follows:

1. Names and Addresses of Attorneys.
2. Complaint.
3. Motion to Dismiss or in the Alternative to Strike from Complaint or for a more Definite Statement or for a Bill of Particulars, Notice of.
4. Minute Order Entered September 20, 1945.
5. Minute Order Entered October 31, 1945.
6. Minute Order Entered November 13, 1945.
7. Stipulation and Order dated November 14, 1945.
8. Minute Order entered November 19, 1945.
9. Minute Order entered November 26, 1945.
10. Amended Complaint.
11. Motion to Dismiss or in the Alternative to Strike from Amended Complaint.
12. Minute Order entered December 17, 1945.

116 *Mandeville Island Farms, Inc., et al.,*

13. Minute Order entered January 6, 1946.

14. Opinion.

15. Order Granting Motion to Dismiss and Judgment of Dismissal.

16. Notice of Appeal.

17. Statement of Points on Appeal.

18. Designation of Record on Appeal.

Respectfully submitted,

WOOD, CRUMP, ROGERS &
ARNDT

/s/ By STANLEY M. ARNDT

Attorneys for Appellants

[Endorsed]: Filed March 4, 1946. Paul P.
O'Brien, Clerk.

No. 11266

**IN THE
United States Circuit Court of Appeals
For the Ninth Circuit**

MANDEVILLE ISLAND FARMS, INC., a corporation, and ROSCOE C. ZUCKERMAN,

Appellants,

vs.

**AMERICAN CRYSTAL SUGAR COMPANY,
a corporation,**

Appellee.

**Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division**

**PROCEEDINGS HAD IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT**

United States Circuit Court of Appeals for the
Ninth Circuit

Excerpt from Proceedings of Monday, November
18, 1946.

Before: Mathews, Stephens and Orr,
Circuit Judges.

[Title of Cause.]

ORDER OF SUBMISSION

Ordered appeal herein argued by Mr. Stanley
Arndt, counsel for appellants, and by Mr. Pierce
Works, counsel for appellee, and submitted to the
court for consideration and decision.

United States Circuit Court of Appeals for the
Ninth Circuit

Excerpt from Proceedings of Tuesday, January
14, 1947.

Before: Mathews, Stephens and Orr,
Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION
AND FILING AND RECORDING OF DE-
CREE

Ordered that the typewritten per curiam opinion
this day rendered by this Court in above cause be
forthwith filed by the clerk, and that a decree be
filed and recorded in the minutes of this court in
accordance with the opinion rendered.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11,266

Jan. 14, 1947

MANDEVILLE ISLAND FARMS, INC., a Corporation, and ROSCOE C. ZUCKERMAN,

Appellants,

vs.

AMERICAN CRISTAL SUGAR COMPANY, a Corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Before: Mathews, Stephens and Orr,
Circuit Judges.

PER CURIAM OPINION

This is an appeal from a judgment of dismissal of the amended complaint. The judge presiding prepared and filed an opinion setting forth fully his reasons for the dismissal (64 F. Supp. 265). The first paragraph thereof reading as follows: "This action comes before me on a motion to dismiss the amended complaint of certain sugar beet grow-

ers, who are seeking treble damages under the Anti-Trust Act, Secs. 1 to 7, 15 note, Title 15 U.S.C.A., from the defendant sugar refiner, alleging a conspiracy, the effect of which prevented the sale of sugar beets on a free and open competitive market. The motion to dismiss is based on the ground that the raising of sugar beets has no direct effect upon interstate commerce and therefore does not come within the purview of the Anti-Trust Act."

We have carefully examined the opinion and approve it except in the instances hereinafter set out. We do not approve the citation of tax cases as authority for any issue in the case, although their citation presents no inconsistency in the opinion.

We cite the opinion of *Wickard v. Filburn*, 317 U.S. 111, 121-125, upon the historic course of national legislation in relation to "trusts" wherein the suggestion is made that instead of the expression "direct effect" on interstate commerce when applied to the Sherman Anti-Trust Act the more accurate expression is "substantial economic effect" on interstate commerce.

We do not reach and therefore make no expression upon the appellee's claim that if the amended complaint states a cause of action in conspiracy the appellants are co-conspirators and therefore are in *pari delicto*.

Affirmed.

[Endorsed]: Opinion. Filed Jan. 14, 1947. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the
Ninth Circuit

No. 11266

MANDEVILLE ISLAND FARMS, INC., et al.,

Appellants,

vs.

AMERICAN CRYSTAL SUGAR COMPANY,

Appellee.

DECREE

Appeal from the District Court of the United States for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted:

On Consideration Whereof, it is now here ordered, adjudged, and decreed by this Court, that the judgment of the said District Court in this cause be, and hereby is, affirmed with costs in favor of the appellee and against the appellants.

It Is Further Ordered, Adjudged, and Decreed by this Court, that the appellee recover against the appellants, for costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered January 14, 1947.

**United States Circuit Court of Appeals for the
Ninth Circuit**

**Excerpt from Proceedings of Thursday, March
27, 1947.**

**Before: Mathews, Stephens and Orr,
Circuit Judges.**

[Title of Cause.]

**ORDER DENYING PETITION FOR
REHEARING**

Upon consideration of the petition of appellant, filed February 12, 1947, and within time allowed therefor by rule of court, for a rehearing of above cause, and of the answer to petition for rehearing filed February 19, 1947, and by direction of the Court, It Is Ordered that the petition for rehearing be, and hereby is denied.

United States Circuit Court of Appeals for the
Ninth Circuit

[Title of Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT
COURT OF APPEALS FOR THE NINTH
CIRCUIT, TO RECORD CERTIFIED UN-
DER RULE 38 OF THE REVISED RULES
OF THE SUPREME COURT OF THE
UNITED STATES

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred twenty-three (123) pages, numbered from and including 1 to and including 123, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellants, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 7th day of April, 1947.

[Seal]

PAUL P. O'BRIEN,
Clerk.

SUPREME COURT OF THE UNITED STATES**ORDER ALLOWING CERTIORARI—Filed June 2, 1947**

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1464)

FILE COPY

IN THE

Supreme Court of the United States

October Term, 1946

No.

1310

75

MANDEVILLE ISLAND FARMS, INC., a Corporation, and
ROSCOE C. ZUCKERMAN,

Petitioners,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a Corporation,

Respondent.

Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Ninth Circuit and
Brief in Support Thereof.

GUY RICHARDS CRUMP,

535 Rowan Building, Los Angeles 13, California

Attorney for Petitioners.

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3. The courts below erred in holding that the price-fixing combination herein involved did not come under the Sherman Act 36.
 - A. The contract between the growers and the refinery provided that the price to be paid by the refinery to the grower for the beets was fixed by the returns secured by the refinery from the interstate sale of the processed product. Until the sugar was sold in interstate commerce, the amount to be paid the grower could not be determined. Therefore, interstate commerce was involved..... 36
 - B. Under the contract the grower was really selling sugar to the refinery because it was only the sugar in the beets for which he was paid. This sugar, when extracted, was sold in interstate commerce. This latter sale determined the price paid the grower for the beets. Therefore, interstate commerce was involved..... 37

- C. The complaint specifically alleged that the various steps involved in the production of beet sugar, from the preparation of the ground for planting of the seed to the sale in interstate commerce of the extracted sugar, were "inextricably intermingled with and directly affected by each other" and were "part of one transaction." Therefore, interstate commerce was involved..... 39
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7. The District Court erroneously held that farmers who either had to sign the crop contract prepared by the conspirators or not grow any sugar at a time when sugar was vitally needed by this nation, were in *pari delicto* and could not recover because they "joined the conspiracy and furthered the object of the same" by signing the contract. The Circuit Court of Appeals, instead of repudiating such a holding stated: "We do not reach and therefore make no expression upon this claim." The Circuit Court of Appeals erred in so doing. The doctrine enunciated by the District Court would result in making "private remedies under the Sherman Act illusory if not non-existent for many, perhaps most, victims of restraint of trade." The Circuit Court of Appeals should not have remained passive when faced with such a doctrine but should have definitely repudiated it. This court should establish uniformity by repudiating the District Court's doctrine 56

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IN THE
Supreme Court of the United States

October Term, 1946

No.

**MANDEVILLE ISLAND FARMS, INC., a Corporation, and
ROSCOE C. ZUCKERMAN,**

Petitioners,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a Corporation,

Respondent.

**Petition for Writ of Certiorari to the United States
Circuit Court of Appeals for the Ninth Circuit.**

To the United States Supreme Court:

Petitioners Mandeville Island Farms, Inc., a corporation and Roscoe C. Zuckerman respectfully pray that a Writ of Certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit, entered January 14, 1947 in that court, in the case therein pending No. 11266 entitled "Mandeville Island Farms, Inc., a corporation and Roscoe C. Zuckerman, appellants, v. American Crystal Sugar Company, a corporation, appellee, and the order of said court dated March 27, 1947 denying petition for rehearing.

1. Jurisdiction.

The Judgment of the Circuit Court of Appeals was filed January 14, 1947; Petition for Rehearing was filed February 12, 1947; and an Order denying said Petition for Rehearing was filed March 27, 1947. This Petition is being filed within three months of the filing of said Order of the Circuit Court of Appeals denying said Petition for Rehearing. The jurisdiction of the Supreme Court is invoked under Section 240-a of the Judicial Code of the United States, as amended by Act of February 13, 1925 (28 U. S. C. A., Sec. 347-a).

2. Opinions Below.

The opinion of the District Court in support of its decision is printed in 64 Fed. Supp. 265. It appears in the Transcript at pages 100-108.

The Circuit Court of Appeals rendered a *per curiam* opinion on petitioners' appeal. This opinion is printed in 129 F. (2d) 71. It appears in the Transcript at pages 120-21. The order denying the petition for rehearing was a *per curiam* order without opinion. It is not yet reported. It appears in the Transcript at page 123.

3. Statute Involved.

This is an action brought by persons injured in their business and property by reason of acts forbidden in the Anti-Trust Laws of the United States (15 U. S. C. A. Secs. 1, 2, 7, 15, commonly called the "Sherman Act"), and brought in the District in which defendant is found and has an agent, to recover three-fold damages.

4. Statement of the Case.

This is a petition to secure review of an order of the Circuit Court of Appeals for the Ninth Circuit affirming the decision of the District Court (and from an order denying a rehearing), which District Court decision granted a motion to dismiss and dismissed the amended complaint brought under the Sherman Anti-Trust Act for damages, on the ground that the amended complaint did not state facts sufficient to constitute a claim upon which relief could be granted.

Inasmuch as the District Court granted a motion to dismiss without the introduction of any evidence, the allegations of the amended complaint must be taken as true. (*Columbia Broadcasting System v. U. S.*, 316 U. S. 407, 414.).

The amended complaint sets forth a conspiracy to fix and maintain prices paid sugar beet growers by all of the sugar refineries in Northern and Central California wherein these refineries, engaged in interstate commerce, agreed upon and maintained the same price and same contract with all growers in the area.

The amended complaint alleges (Roman numerals refer to paragraph numbers of the complaint, Arabic to Transcript page numbers):

"Mandeville Island is a tract of land located in California north of the 36th parallel suitable in composition, drainage, irrigation, location, and climate and transportation facilities for the successful raising of sugar beets suitable for processing into sugar. At all times herein mentioned plaintiffs have had supplies, equipment, tools, personnel, labor, organization, and knowledge adequate for the successful raising on

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Mandeville Island of sugar beets suitable for processing into raw sugar." [III—T. 69-70.]

"On September 11, 1939, the second world war broke out and thereafter and up to December 7, 1941, the United States was in danger of being drawn into said conflict and was preparing its defenses against its possible entry into said conflict. On December 7, 1941, the Japanese attacked the United States at Pearl Harbor. This was followed by declaration of war between the United States and all the members of the Axis. At all times from September 11, 1939, the sugar beet industry was and now is one of the vital industries of the United States and the growing of sufficient sugar beets to provide for national demands and defense and for the beet sugar stock pile necessary for military purposes was a matter of national welfare. As a result, the United States Government rationed the use of sugar in the United States and said rationing still continues. The various steps involved in the production and protection of beet sugar, including the growing of sugar beets, the harvesting thereof, the delivering of the beets to the manufacturer, the processing into sugar and the sale and distribution of sugar in interstate commerce to the ultimate consumer, were at all times herein mentioned and now are inextricably intermingled with and directly affected by each other and have an immediate relation on each other. Each of said steps was at all times herein mentioned and now is a part of a transaction that commenced when the ground was prepared for planting the sugar beet seed and was completed when the sugar was used by the ultimate consumer." [V—T. 70-71.]

"During the crop seasons 1938 to 1942, large acreages of agricultural land in the United States, . . . were planted to sugar beets. Said

sugar beets, when harvested, were not sold in central markets . . . but were produced by growers under contract with manufacturers . . . and immediately upon being harvested were delivered to these manufacturers and taken to their beet sugar refineries where the sugar beets were manufactured by an elaborate process into raw sugar by the said manufacturers, who thereafter sold the resulting sugar in interstate commerce. . . . " [VI—T: 71-72.]

"The only practical market available to growers of sugar beets in California north of the 36th parallel during said period was sale to one of the three manufacturers that operated one or more beet sugar refineries in said district. Defendant was one of said three manufacturers. The initial outlay for the construction of a beet sugar refinery was so great, the annual upkeep and operating expenses were so large, and the time involved in erecting and equipping a beet sugar refinery so long that no competition from any new refinery could be expected within a period of time shorter than two years, even if the necessary material and equipment priorities could be secured. During all of said period, said three manufacturers of sugar beets had a complete monopoly of the supply of sugar beet seeds and in the manufacture of sugar beets into sugar in California north of the 36th parallel and owned and controlled all sugar beet factories in said area of California which manufactured sugar beets into sugar, and no grower of sugar beets in California north of the 36th parallel could, during any part of said period, sell sugar beets at a profit except to one of said manufacturers.

"The sugar manufactured from said sugar beets was, during all of said period, sold in interstate commerce throughout the United States.

"After the raw sugar had been produced, it was impossible to distinguish the manufactured beet sugar.

manufactured from sugar beets grown in any one part of the United States from that manufactured from sugar beets grown in any other part of the United States.

"During said period above referred to, the only sugar beet seeds available in said portion of California were those securable from one of said three manufacturers and the only method of sale of marketable sugar beets used by growers of sugar beets in said area of California was by sale to one of the said three manufacturers under standard form printed contracts prepared by the manufacturers whereby the price to be paid by the manufacturer to the grower of sugar beets was determined for beets of a given sugar content by the net price received from the sale in interstate commerce of the raw sugar manufactured from the sugar beets delivered by the various growers to the manufacturers. A grower who did not enter into one of said standard forms of contract could not get seed from any source and was unable to grow any sugar beets." [VI—T. 72-73.]

"In and by said standard contract, the grower agreed (a) to plant a specified acreage to sugar beets with seed furnished by the manufacturers to the grower at grower's cost, (b) to cultivate said land after the same had been planted and to care for and harvest the sugar beets, and (c) to deliver the beets so harvested to the manufacturers. The manufacturer agreed in and by said contract (a) to accept delivery of said sugar beets from the grower, except that the manufacturer had the right to reject any beets that were diseased, wilted or not suitable for the manufacture of sugar, (b) to manufacture into sugar the sugar beets accepted by it, (c) to make on the 15th day of each month an advance payment for the sugar beets delivered during the preceding

month, based on the estimate made by the manufacturer of the sugar sold and to be sold which had been manufactured from beets produced by the grower and other growers under like contracts, and (d) to make final (in point of time) payment for all beets on or before August 31st of the next crop year, the price to be paid for said beets to be determined by the sugar content of the beets of the individual grower and the net return received from the sale of the manufactured raw sugar in interstate commerce." [VII—T. 74.]

"Prior to the crop season of 1939 and subsequent to the crop season of 1941, the net return from the sale of manufactured raw sugar was determined under the contracts by the net return from the sale of raw sugar manufactured in beet sugar factories of the particular contracting manufacturer from beets delivered to said manufacturer by the grower and other growers in the same area during the particular crop season, in accordance with the schedule set forth in the standard contract. . . . But during the crop seasons of 1939, 1940 and 1941, pursuant to the conspiracy hereinafter referred to, the standard printed contract as used by all of said manufacturers provided that the net return used as a basis for the prices to be paid the grower was the average net return of all manufacturers manufacturing sugar north of the 36th parallel in California and not the net return of the particular manufacturer with whom the grower contracted and to whom the beets were delivered and by whom the beets were manufactured into raw sugar." [VIII—T. 74-75.]

"Thereupon and some time in 1937 or 1938, said defendant illegally and wrongfully entered into a conspiracy with each and every one of the other manufacturers of sugar in California whose plants

were located north of the 36th parallel to unlawfully monopolize and restrain trade and commerce among the several states and to unlawfully fix prices to be paid the growers of sugar beets, all in violation of the anti-trust laws of the United States; and as a part of said unlawful conspiracy agreed among themselves to do and did as follows during the crop years 1939, 1940, and 1941

"(a) Each no longer competed against any of the others as to the price to be paid the growers for sugar beets raised in California north of the 36th parallel.

"(b) Each paid the same price to growers of sugar beets in California north of the 36th parallel and no more, to-wit: the price determined upon the average net returns from the sale of raw sugar of all sugar manufactured in the plants of said conspirators north of the 36th parallel in California and did not pay the growers upon the net returns from the sale of sugar manufactured in California north of the 36th parallel by the particular manufacturer to whom the particular grower was under contract.

"(c) Each no longer competed with any of the other manufacturers of sugar north of the 36th parallel as to efficiency of sales, or manufacturing organizations, but instead, and regardless of the efficiency or lack of efficiency of the sales or manufacturing organization of any of the conspirators, and regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, paid all growers of sugar beets in California north of the 36th parallel, the same price for the same amount of beets of the same sugar content.

"(d) Instead of paying the growers of sugar beets a reasonable price for their beets, each of said conspirators furnished seeds to, entered into contracts

with and bought beets only from growers who signed a standard printed form of contract prepared by said manufacturers, identical in all material terms. Farmers contemplating or desirous of growing sugar beets either signed such a contract with one of said conspirators or could not get seeds to plant sugar beets or a market to sell their marketable beets except for hog or cattle feed at a large loss.

"(e) Said prices agreed upon by defendant and its co-conspirators to be paid by them and paid by them to plaintiffs and other sugar beet growers in California north of the 36th parallel and set forth in said contracts are not the reasonable prices for sugar beets. . . . " [IX—T. 75-77.]

"Prior to the 1939 crop season, the various manufacturers of sugar in California north of the 36th parallel, including defendant, competed in interstate commerce with each other as to the performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales return and decrease expenses and to operate as efficiently as possible and thus to increase the unit return to growers of sugar beets under said standard contract. During the sugar beet crop year of 1938, the net gross receipts of sales of sugar, (less allowances, federal excise taxes, freight to destination, and cash discounts to customers) secured by defendant were 3.641 cents per pound while, at the same time, the like average net gross receipts from the other manufacturers of beet sugar in California north of the 36th parallel were 3.348 cents per pound, or .265 cents less than the net gross receipts secured by defendant. As a result thereof, during the crop year 1938, sugar beet growers in California north of the 36th parallel who had contracted with defendant received on the average from 29½ cents to 52½

cents per ton more for sugar beets delivered to defendant corporation under said standard contract than did growers of identical beets of identical sugar content delivered to the other manufacturers of beet sugar in California north of the 36th parallel." [X—T. 77-78.]

"During said crop seasons of 1939, 1940 and 1941, as a direct result of said conspiracy, expected and planned by said conspirators, there was no longer any such competition between the conspirators.

Defendant, as a result of said conspiracy, did not during said crop seasons of 1939, 1940 and 1941, conduct its interstate operations in as efficient and careful manner as it had prior thereto (when there was no conspiracy but was competition between itself and the other manufacturers), or in as efficient or careful manner as it would have had said conspiracy not existed. As a result thereof, defendant received less in sales returns for its raw sugar and incurred more expense in its operations in said crop years than it would have had competition been free from and unrestrained by said conspiracy and plaintiffs did not receive the reasonable value of their sugar beets." [XI—T. 78-79.]

"As a direct, expected and planned result of said conspiracy, the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed, and, instead of defendant and the other said manufacturers producing and selling raw sugar in interstate commerce with individual enterprise and sagacity, and in competition with each other as they had previously done, they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system which it was and is the purpose of the anti-trust acts to protect and which had existed prior to said

conspiracy. As a further direct, expected and planned result of said conspiracy, any and all incentive that theretofore existed for defendant and the other said manufacturers to be efficient and economical and to develop individual enterprise and sagacity, disappeared, and, during said crop seasons, said three manufacturers operated, in so far as the growers were concerned, as if they were one corporation owning and controlling all sugar beet factories in California north of the 36th parallel but with three completely separate overheads and with none of the efficiency that consolidation into one corporation might bring." [XII—T. 79-80.]

"Said conspiracy continued throughout the crop years of 1939, 1940 and 1941, and until August 31, 1942, when the last payment was made under the 1941 standard contract and said conspiracy has been continued thereafter up to the present time in so far as defendant and each of its co-conspirators still refuse and will not make payments to any of the growers other than in accordance with the method agreed upon in said conspiracy as above set forth, and will not furnish any of the growers the individual, as contrasted with the pooled, sales return of the particular manufacturer with whom said grower dealt. Plaintiffs herein demanded in writing such information of defendant but defendant refused to and has not furnished the same." [XIII—T. 80.]

Defendant and Mandeville entered into one of defendant's standard form contracts for the 1939 and 1940 crop seasons, and defendant and Zuckerman for the 1941 crop season. Plaintiffs performed each and every term, condition and covenant on their part to be performed in said contracts and Mandeville delivered 22,355.6 tons of sugar beets in the 1939 crop year and 25,430.3 tons of sugar beets in the 1940 crop year and Zuckerman delivered 14,144.7 tons of

sugar beets in the 1941 crop year, of average sugar content specified in the complaint. Defendant accepted the sugar beets and manufactured them into sugar. [XV, XVI, XVII—T. 83, 84, 85.]

"The net sales return secured from sugar sold by defendant was greater than the average secured by all manufacturers of sugar north of the 36th parallel; but in carrying out said conspiracy and as a part and parcel thereof, defendant paid plaintiff not upon the price secured in interstate commerce from beets refined by defendant nor upon the reasonable value of the sugar beets, but in accordance with the average net return secured in interstate commerce for sugar by all manufacturers of beet sugar with refineries in California north of the 36th parallel" in accordance with the conspiracy. "Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce in competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, plaintiff, Mandeville Island Farms, Inc., would have received at least \$105,014.60 more and plaintiff Roscoe C. Zuckerman would have received at least \$37,397.38 more than each did receive under said contracts and said plaintiffs, respectively, sustained damages accordingly, none of which damage has been paid." [XVIII—85, 86.]

An example of the method of paying the grower under the contract follows: The grower whose beets had a 20% sugar content in 1940 received \$5.66 per ton for his beets if the sugar refineries received a net average of $3\frac{1}{2}$ ¢ per lb. for the raw sugar when sold in interstate commerce, \$7.22 per ton if the refineries received a net average of 4¢ per lb. and, \$9.31 per ton if the refineries received 5¢ per lb.

The District Court, while holding that the contracts on their faces showed a combination to fix and maintain prices in restraint of trade, held that plaintiff-farmers could not recover for two reasons: first, production of the sugar beets and their manufacture into sugar were "local" and not "interstate", therefore, there was no violation of the Sherman Act (citing the old tax case of *Coe v. Errol* 116 U. S. 517, and various cases which followed it); and second, even if there were a violation of the Sherman Act, plaintiffs could not recover because the contracts were on their faces so palpably in restraint of trade that the plaintiffs became *in pari delicto* by entering into them.

Plaintiff-farmers appealed to the Circuit of Appeals for the Ninth Circuit. That Court, ignoring the many recent cases under the Sherman Act, affirmed the District Court on its first ground, but did not "reach" the second. In affirming the District Court on its first ground the Circuit Court of Appeals stated: "We have carefully examined the opinion and approved it except in the instances hereinafter set forth. We do not approve the citation of tax cases as authority for any issue in the case, although their citation presents no inconsistency in the opinion." Nevertheless, of the five cases cited by the District Court in support of its first point, one was a tax case (*Coe v. Errol*), three were cases which followed and relied upon *Coe v. Errol*, while the fifth (*Parker v. Brown*), instead of being in support of the District Court, was directly to the contrary!

A Petition for Rehearing was filed. This was denied by the Circuit Court of Appeals and this Petition for Certiorari follows.

5. Questions Presented.

A. THE PRIMARY QUESTION PRESENTED IS THIS:

Have plaintiff-farmers a cause of action under the Anti-Trust Act under the following facts: The various steps involved in the production of beet sugar (purchase of the seed by the grower, the planting of the seed, the growing and harvesting of the beets, the delivery of the beets to the refinery, the processing of the beets into sugar, and the sale and distribution of the sugar in interstate commerce) were at all times herein mentioned inextricably intermingled and directly affected by each other and had an immediate relation upon each other. Each of said steps at all times herein mentioned was part of a transaction that commenced when the ground was prepared for planting the seed and was completed when the sugar was used in interstate commerce by the ultimate consumer. Three corporations, of which defendant was one, had a complete monopoly in the supply and sale of sugar-beet seed and the manufacture of sugar beets into sugar in California north of the 36th parallel (*i. e.*, Northern and Central California.) They owned and controlled all sugar beet factories there located. No growers of sugar beets in the area could sell sugar beets at a profit except to them. They had the only practical market available to beet growers in the area. Prior to the crops season of 1939, these three corporations competed with each other. But in 1937 or 1938 they entered into a conspiracy whereby they agreed to and did operate, in so far as the growers were concerned, as if they were only one corporation owning and controlling all sugar beet factories in Northern and Central California, but with three completely separate overheads and with none of the efficiency

which consolidation into one corporation might bring. They no longer competed as to the price to be paid sugar beet growers. They fixed and maintained the price to be paid sugar beet growers. They adopted a uniform contract which provided that the price to be paid growers should be determined by the average net return received by the three refineries from the sale of the raw sugar in interstate commerce, regardless of the price received by the particular refinery with whom a particular grower contracted. They paid the same agreed price to all growers, which price was not a reasonable price. They refused to furnish seed to or buy sugar beets from any grower, unless he would sign their uniform contract and the grower had either to sign the contract or not grow sugar beets. They no longer competed in interstate commerce as to the ability and efficiency of their respective manufacturing, sales or executive departments; they no longer endeavored to increase sales returns or decrease expenses as they had formerly done. They so conducted their interstate commerce, without competition, that they received less returns for sugar sold in interstate commerce and incurred more expense than had there been competition. Plaintiff-farmers owned land in Central California, particularly suitable to the growing of sugar beets and had the facilities and knowledge for growing sugar beets. They either could not grow any sugar beets at a time when sugar was a vital need to this nation, or had to sign one of the standard contracts with one of the conspirators. They signed with defendant. Had it not been for the conspiracy and if the sugar had been manufactured and sold in competition instead of under the conspiracy, plaintiff-farmers would have received many thousands of dollars more for their sugar than they did receive.

B. THIS PRIMARY QUESTION MAY BE DIVIDED INTO SECONDARY QUESTIONS, AS FOLLOWS:

1. Inasmuch as Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied, but exercised all the power it possessed, are cases arising under various acts passed by Congress under the Commerce Clause authoritative in cases arising under the Sherman Act?

2. Where the contract between the growers and the refinery provided that the price to be paid by the refinery to the growers for the beets was fixed by the returns secured by the refinery from the interstate sale of the processed product, and where the amount to be paid the grower could not be determined until the sugar was sold in interstate commerce, was interstate commerce involved?

3. Where, under the contract, the grower was really selling sugar to the refinery because it was only the sugar in the beets for which he was paid, and where the sugar, when extracted, was sold in interstate commerce by a sale which determined the price paid the grower for the beets, was interstate commerce involved?

4. Where the various steps involved in the production of beet sugar, from the preparation of the ground for planting of the seed to the sale in interstate commerce of the extracted sugar were inextricably intermingled with and directly affected by each other and were part of one transaction, was interstate commerce involved?

5. Are products of the farm which are subsequently manufactured or processed into articles of interstate commerce within the reach of the Anti-Trust Act?

6. Is price-fixing illegal *per se* under the Sherman Act?

7. Is a combination among interstate processors fixing prices to be paid to local producers for their products reached by the Sherman Act if the processed product is intended to cross state lines?

8. Where the price-fixing acts complained of were a part of the conspirators' interstate commerce, does a plaintiff's cause of action depend upon the plaintiff himself being engaged in interstate commerce?

9. Where the growing of beets, the processing of them into sugar and the sale of the sugar were part of the stream of interstate commerce, if all done by the refiner, was that stream broken if an independent contractor, instead of the refiner itself, did the growing?

10. Should persons damaged by price-fixing conspiracies be denied recovery because some other persons were not damaged to the same extent?

11. Where a combination fixes prices to be paid producers for the raw product, can it escape liability to them by not raising prices to the ultimate consumer of the processed product?

12. Are early cases involving local taxation or regulation in matters involving the safety, health and well-being of local communities authoritative as to actions under the Sherman Act?

13. Where a farmer either had to sign the standard crop contract prepared by the price-fixing conspirators or not grow any sugar at a time when sugar was vitally needed by the nation, was he *in pari delicto* because he signed the contract?

6. Specifications of Error To Be Urged.

Petitioners rely upon the following specifications of error:

1. The Circuit Court of Appeals erred in affirming the District Court's order which granted defendant's motion to dismiss.

2. The Circuit Court of Appeals erred in affirming the District Court in rendering judgment of dismissal in favor of defendant, American Crystal Sugar Company, and against plaintiffs, which judgment was entered and noted in the District Court Civil Docket, January 14, 1946.

3. The Circuit Court of Appeals erred in denying the petition of appellants for rehearing.

4. The Circuit Court of Appeals erred in holding that plaintiff-farmers had no cause of action under the Sherman Act under the facts alleged in the amended complaint.

5. The Circuit Court of Appeals erred in holding that no interstate commerce was involved where the contract between the growers and the refinery provided that the price to be paid by the refinery to the growers for the beets was fixed by the returns secured by the refinery from the interstate sale of the processed product and where the amount to be paid the growers could not be determined until the sugar was sold in interstate commerce.

6. The Circuit Court of Appeals erred in holding that interstate commerce was not involved where, under the contract, the grower was really selling the sugar in the beets to the refinery, and where the sugar, when extracted, was sold in interstate commerce by a sale which determined the price paid the grower for the beets.

7. The Circuit Court of Appeals erred in holding that interstate commerce was not involved where the various steps involved in the production of beet sugar, from the preparation of the ground for the planting of the seed to the sale in interstate commerce of the extracted sugar, were inextricably intermingled with and directly affected by each other and were part of one transaction.

8. The Circuit Court of Appeals erred in holding that products of the farms which were subsequently manufactured or processed into articles of interstate commerce were beyond the reach of the Sherman Act.

9. The Circuit Court of Appeals erred in not holding that price fixing is illegal *per se* under the Sherman Act.

10. The Circuit Court of Appeals erred in holding that a combination among interstate processors in fixing prices to be paid local producers for their products is not reached by the Sherman Act, even though the processed product is intended to cross state lines.

11. The Circuit Court of Appeals erred in holding that plaintiff's cause of action under the Sherman Act depends upon the plaintiff himself being engaged in interstate commerce, even though the price-fixing acts complained of were a part of the conspirator's interstate commerce.

12. The Circuit Court of Appeals erred in holding that where the growing of beets and processing of them into sugar and sale of the sugar were part of the stream of interstate commerce done by the refinery, that stream was broken if an independent contractor, instead of a refinery, did the growing.

13. The Circuit Court of Appeals erred in holding that persons damaged by price-fixing conspiracies should be

denied recovery merely because some other persons were not damaged to the same extent.

14. The Circuit Court of Appeals erred in holding where a combination fixes prices to be paid producers for the raw product, it can escape liability to them by not raising prices to the ultimate consumer of the processed product.

15. The Circuit Court of Appeals erred in applying cases which involved local regulation in matters involving the safety, health and well-being of local communities as authoritative in actions under the Sherman Act.

16. The Circuit Court of Appeals erred in not repudiating the holding of the District Court that where a farmer either had to sign the standard crop contract prepared by the price-fixing conspirators or not grow any sugar, at a time when sugar was vitally needed by the nation, that farmer became *in pari delicto* by signing the contract.

7. Reasons Relied Upon for Allowance of Writ.

1. The Circuit Court of Appeals has decided certain questions arising out of the Sherman Anti-Trust Act in a way which conflicts with the decisions of the Supreme Court.

(a) It held that since the production of sugar beets, the delivery by the farmer to the refinery and the refining of the sugar beets all took place within the State of California, those transactions should be separated, in so far as the Sherman Anti-Trust Act is concerned, from the balance of the interstate transaction of which they were inseparable parts, contrary to *American Tobacco Co. v. U. S.*, 328 U. S. 781; *W. H. Montague & Co. v. Lowry*, 193

U. S. 38; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 297; *U. S. v. South-Eastern Underwriters Association*, 322 U. S. 533; *Curriu v. Wallace*, 306 U. S. 1; *U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533.

(b) It considered an isolated, local transaction in determining the application of the Sherman Anti-Trust Act instead of drawing the true prospective from the entire picture by ignoring the fact that the grower was really selling the sugar in his beets and that the price paid him was determined by the average net return secured by the refineries from the sale of the raw sugar in interstate commerce, contrary to *U. S. v. South-Eastern Underwriters Association*, 322 U. S. 533, 536; *U. S. v. Bausch & Lomb Optical Co.*, 321, U. S. 707, 720; *Nippert v. Richmond*, 327 U. S. 416.

(c) It held that products of the farm which were subsequently manufactured or processed into articles of interstate commerce were beyond the reach of the Sherman Anti-Trust Act, contrary to *American Tobacco Co. v. U. S.*, 328 U. S. 781; *Wickard v. Filburn*, 317 U. S. 111; *Curriu v. Wallace*, 306 U. S. 1; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110; *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726; *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 465; *Mulford v. Smith*, 307 U. S. 38.

(d) It held that the fixing and maintenance of local retail prices removed a conspiracy from the scope of the Sherman Act, contrary to *U. S. v. Univis Lens Co.*, 316 U. S. 241, 253; *Ethyl Gasoline Corp. v. U. S.*, 309 U. S. 436, 458; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720; and *American Tobacco Co. v. U. S.*, 328 U. S. 781.

(e) It did not apply the rule of law that price fixing and price maintenance combinations are illegal *per se* under the Sherman Act, as set forth in *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 296; *U. S. v. Socony Vacuum Oil Co.*, 310 U. S. 150, 212, 213, 218; *U. S. v. Masonite Corp.*, 316 U. S. 265, 274; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.

(f) It held that practices affecting a product before the product crossed the State line could not be reached by the Sherman Act, even though it was intended that the product was to be placed in interstate commerce and even though the practices were part of the entire transaction, contrary to *American Tobacco Co. v. U. S.*, 328 U. S. 781; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720; *U. S. v. Frankfort Distilleries*, 324 U. S. 293; *Curry v. Wallace*, 306 U. S. 1; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110, 120; *Local 167 v. U. S.*, 291 U. S. 293, 297.

(g) It held that one group of farmers injured by a price fixing and price maintenance conspiracy could not recover if some other farmers were not injured, contrary to the ruling in *U. S. v. Socony Vacuum Oil Co.*, 310 U. S. 150, 212, 213, 218; *U. S. v. Bausch & Lomb Optical Co.*, 327 U. S. 707, 720, and *U. S. v. Aluminum Co. of America*, 148 F. (2d) 416, that price fixing agreements are illegal *per se* and that good motives or economic results are immaterial.

(h) It held that no matter if prices paid the original producer or seller of a commodity are fixed by processors, there can be no violation of the Sherman Act unless and until prices are raised to the ultimate buyer of the processed product, contrary to the decision in *American To-*

bacco. Co. v. U. S., 328 U. S. 781 and *U. S. v. Aluminum Co. of America*, 148 F. (2d) 416.

(i) It held that if the sugar beets had not been processed into raw sugar but had been sold by defendant as sugar beets in interstate commerce, the Sherman Act would apply to the price-fixing conspiracy here involved, but that the chain of interstate commerce was broken because the sugar beets were processed by an intrastate operation into raw sugar, contrary to *American Tobacco Co. v. U. S.*, 328 U. S. 781; *Wickard v. Filburn*, 317 U. S. 111; *Curran v. Wallace*, 306 U. S. 1; *U. S. v. Wrightwood Dairy Company*, 315 U. S. 110; and *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726.

(j) The court below impliedly held that while the raising of the beets and the manufacture of the sugar were part of the chain of interstate commerce under various Federal statutes, they were not under the Sherman Act, contrary to the decisions in *Atlantic Cleaners & Dyers, Inc. v. U. S.*, 286 U. S. 427, 435; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495; *U. S. v. Darby*, 312 U. S. 100; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 298, wherein it was held that Congress, in passing the Sherman Act, left no area of its constitutional powers unoccupied.

(k) It relied upon early cases involving local regulation in matters involving the safety, health and well-being of local communities and applied the mechanical, legal formulas there set forth, contrary to the decisions in *Wickard v. Filburn*, 317 U. S. 111; *Parker v. Brown*, 317

U. S. 341; *U. S. v. Wrightwood Dairy Company*, 315 U. S. 110; *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726; *U. S. v. Darby*, 312 U. S. 100; *U. S. v. Rock Royal Coop.*, 307 U. S. 533; *Currin v. Wallace*, 306 U. S. 1, 12; and *Mulford v. Smith*, 307 U. S. 38, 47.

(l) It reached a conclusion directly opposite to that reached by *American Tobacco Co. v. U. S.*, 328 U. S. 781, which held that restraints of trade identical with those here involved violated the Sherman Act.

(m) It held that the stream of interstate commerce was broken by having an independent contractor perform some of the steps within the boundaries of a State, contrary to *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173 and *Roland Electric Co. v. Walling*, 326 U. S. 657.

2. This decision of the Circuit Court of Appeals leaves the Ninth Circuit out of step, in so far as the Sherman Anti-Trust Act is concerned, with the rest of the nation; with the long since discarded mechanical tests of "manufacture", "production", "direct", "indirect", "local", used to determine whether the Sherman Act applies, instead of limiting such mechanical tests to cases involving local taxation and regulation.

3. If this decision is allowed to remain as the law of the Ninth Circuit, farmers therein will be helpless at the hands of processors, refiners, canners, packers, creameries, etc., engaged in interstate commerce who can, with im-

punity, fix and maintain prices to be paid farmers, restrain trade and create a monopoly as long as they do these things to the farmers, state by state, and have the processing, packing, refining, canning, etc., done within the state of the production of the raw product.

4. If this decision is left as it is, there will be one application of the Sherman Act for farmers and producers in the United States in general, and a different one for those within the Ninth Circuit with the decision in the *Big Three Tobacco Company* cases not applying in the Ninth Circuit.

5. Price-fixing agreements among persons engaged in interstate commerce which heretofore have been illegal *per se*, will be recognized as legal within the Ninth Circuit as long as the price-fixing agreements apply only to the purchase of a commodity which is processed, refined, manufactured, canned or otherwise worked upon within the state of production before it crosses state lines.

6. The result of this decision is that many, perhaps most, victims of restraint of trade are denied relief under the Sherman Act and private remedies to them under the Act become illusory if not quite non-existent.

Wherefore, your petitioners respectfully pray that this petition be granted and that a Writ of Certiorari issue as above set forth.

Dated: April 24th, 1947.

GUY RICHARDS CRUMP,
Attorney for Petitioners.

Certificate of Counsel.

I, counsel for Petitioner, hereby certify that in my opinion the above Petition is well founded and not interposed for delay.

GUY RICHARDS CRUMP.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1946.

No.

**MANDEVILLE ISLAND FARMS, INC., a Corporation, and
ROSCOE C. ZUCKERMAN,**

Petitioners,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a Corporation,
Respondent.

**Brief in Support of Petition for Writ of Certiorari to
the United States Circuit Court of Appeals for
the Ninth Circuit.**

I—INTRODUCTORY MATTER.

1. Opinions Below.

The opinion of the District Court is printed in 64 Fed. Supp. 265, and in the Transcript at pp. 100-108. The Circuit Court of Appeals rendered a *per curiam* opinion which is printed in 159 Fed. (2d) 71, and in the Transcript at pp. 120-121. Its order denying petition for rehearing was without opinion, and appears in the Transcript at p. 123.

2. Jurisdiction.

The Judgment of the Circuit Court of Appeals was filed Jan. 14, 1947; Petition for Rehearing was filed Feb. 12, 1947; the Order denying it was filed March 27, 1947. This petition is being filed within three months of the filing of said Order. The jurisdiction of the Supreme Court is invoked under Sec. 240-a of the Judicial Code of the United States, as amended by Act of Feb. 13, 1925 (28 U. S. C., Sec. 347-a).

3. Questions Presented.

These are set forth in the attached Petition and are incorporated herein by reference.

4. Statutes Involved.

This is an action brought by persons injured in their business and property by reason of acts forbidden in the Anti-Trust Laws of the United States (15 U. S. C. A., Secs., 1, 2, 7, 15), commonly called the "Sherman Act", and brought in the District, in which defendant is found and has an agent, to recover threefold damages.

5. Statement of the Case.

This is set forth in the attached Petition and is incorporated herein by reference.

6. Specifications of Error to Be Urged.

These are set forth in the Petition and are incorporated herein by reference.

II—SUMMARY OF ARGUMENT

1. Congress in passing the Sherman Act left no area of its constitutional power unoccupied. It exercised all the power it possessed. Therefore, cases arising not only under the Sherman Act but also under other acts passed by Congress under the Commerce Clause, are authoritative.

2. Since this is an appeal from an order granting a motion to dismiss the complaint on the grounds that it did not state facts sufficient to constitute a claim upon which relief could be granted, the allegations of the complaint must be taken as true. The amended complaint shows on its face a conspiracy to restrain trade by fixing and maintaining prices and to create and maintain a monopoly, as a result of which plaintiffs were injured.

3. Respondents conceded and the courts below held that a conspiracy to fix and maintain prices in restraint of trade, which damaged plaintiffs, was alleged but the District Court held that the Sherman Act was not violated on the ground that "production" and "manufacture" are "local" and not interstate, regardless of the balance of the transaction. It further held that plaintiffs, by signing the contract, became *in pari delicto*. The Circuit Court of Appeals approved the first ground but did not "reach" the second.

4. The courts below erred in holding that the price-fixing combination herein involved did not come under the Sherman Act, for several reasons, any one of which is sufficient to require a reversal of the judgments below. These reasons are:

(a) The contract between the grower and the refinery provided that the price to be paid by the refinery to the

grower for the beets was fixed by the returns secured by the refinery in the interstate sale of the processed product. Until the sugar was sold in interstate commerce, the amount to be paid the grower could not be determined. Therefore interstate commerce was involved.

(b) Under the contract, the grower was really selling sugar to the refinery because it was only the sugar content in the beets for which he was paid. This sugar, when extracted, was sold in interstate commerce. This latter sale determined the price paid the grower for the beets.

(c) The complaint specifically alleged that the various steps involved in the production of beet sugar, from the preparation of the ground for planting of the seed to the sale of interstate commerce of the extracted sugar, were "inextricably intermingled with and directly affected by each other" and part "of one transaction."

(d) Products of the farm which are subsequently manufactured or processed into articles of interstate commerce are within the reach of the Anti-Trust Act. Price-fixing is illegal *per se*. A combination among interstate processors fixing prices to be paid to local producers for their products is reached by the Sherman Act if the processed product is intended to cross state lines.

(e) Plaintiffs' cause of action does not depend on plaintiffs being engaged in interstate commerce where the price-fixing acts complained of were part of the conspirators' interstate commerce.

(f) If respondent itself had grown the beets besides refining them and selling the sugar, each step would have been part of the stream of interstate commerce. This stream was not broken because an independent contractor performed some of the steps.

5. The courts below erred in holding that appellants, although damaged by the price-fixing conspiracy, could not recover because some other farmers were not damaged to the same extent.

6. Trade includes both buying and selling. It is no excuse for monopoly that prices are not raised to the ultimate consumer.

7. The District Court relied upon the 1886 decision of *Coe v. Errol* (a tax case) and upon cases following it. *Coe v. Errol* is no longer any authority on cases arising under the Sherman Act. The Circuit Court of Appeals stated: "We do not approve the citation of tax cases cited as authority for any issue in this case," but the remaining cases cited by the District Court (and approved by the Circuit Court of Appeals) are, with one exception, cases that rely upon the tax case of *Coe v. Errol*. The one case that does not is *Parker v. Brown*, which supports appellants' and not respondent's position. As a result, the decision of the Circuit Court of Appeals has no foundation of authority whatsoever.

8. The District Court erred in holding that farmers who either had to sign the crop contract prepared by the conspirators or not grow any sugar at a time when sugar was vitally needed by this nation, were *in pari delicto* and could not recover because they "joined the conspiracy and furthered the object of the same" by signing the contract. This doctrine would result in making "private remedies under the Sherman Act illusory, if not non-existent, for many, perhaps most, victims of restraint of trade." The Circuit Court of Appeals should not have remained passive when faced with such a doctrine but should have definitely repudiated it.

III—ARGUMENTS AND AUTHORITIES IN SUPPORT OF THE PETITION.

1. (Introductory.) Congress in Passing the Sherman Act Left No Area of Its Constitutional Power Unoccupied. It Exercised All the Power It Possessed.

Congress has passed various statutes under the Commerce Clause, but in passing the Sherman Act it "left no area of its constitutional power unoccupied; it exercised all the power it had." (*Atlantic Cleaners and Dyers, Inc. v. U. S.*, 286 U. S. 427, 435; *Apex Hosiery Company v. Leader*, 310 U. S. 469, 495; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 298. See also *U. S. v. Darby*, 312 U. S. 100, limiting *Carter v. Carter Coal Co.*, 298 U. S. 238, and holding (p. 122) that "The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce.")

Therefore, we will hereafter cite as authority cases arising not only under the Sherman Act but also under various other acts passed by Congress under the Commerce Clause.

2. Respondent Conceded and the Courts Below Held That a Conspiracy to Fix and Maintain Prices in Restraint of Trade, Which Damaged Plaintiffs, Was Alleged but the Lower Courts Held That the Sherman Act Was Not Violated on the Ground That "Production" and "Manufacture" Were "Local" and Not Interstate. A Mere Reading of the Complaint Shows That the Courts Below Erred.

Since this is an appeal from an order granting a motion to dismiss the complaint on the ground that it did not state facts sufficient to constitute a claim upon which relief could be granted, the allegations of the complaint must be taken as true. (*Columbia Broadcasting System v. U. S.*, 316 U. S. 407, 414). These are set forth in the Transcript, pp. 68 to 96 and most of them in the petition. They can be summarized as follows:

A. The steps involved in the interstate production of beet sugar (the growing, harvesting, and delivery of the beets to the refinery, the processing of the beets into sugar, and the sale and distribution of the raw sugar in interstate commerce to the ultimate consumer), were at all times herein mentioned inextricably intermingled with and directly affected by each other and had an immediate relation to each other. Each step was a part of a transaction which commenced when the ground was prepared for planting and which was completed when the sugar was used by the ultimate consumer. [V.—T. 71.]

B. Defendant and its two co-conspirators were engaged in interstate commerce in the selling of sugar-beet seeds, the refining of sugar beets into sugar and the sale of the sugar throughout the country. [II—T. 68-69.]

C. The defendant and its two co-conspirators had a complete monopoly in the sale of sugar-beet seeds and the manufacture of sugar-beets into sugar in Northern and Central California. They owned and controlled all sugar-beet factories there located. No growers of sugar beets in the area could sell sugar beets at a profit except to them. They had the only practical market available to beet growers in the area. [VI—T. 71-74.]

D. Up to and including the 1938 crop season, these three corporations competed with each other, [X—T. 77-78], but in 1937 or 1938 they entered into a price-fixing conspiracy in restraint of trade and to create a monopoly [IX—T. 76-77], whereby, during the cropping years of 1939, 1940 and 1941;

(a) they adopted a uniform contract which provided that the price to be paid the growers should be determined by an *identical* formula, under which the average net return received by all three conspirators from the sale of the raw sugar in interstate commerce, determined the price paid each grower regardless of with which conspirator the grower contracted. [IX—T. 77];

(b) they paid the same agreed price to all growers, which price was not a reasonable price [IX—T. 77];

(c) they refused to furnish seed (the supply of which they controlled) to, or buy sugar beets from any grower unless he would sign their uniform contract and the grower had either to sign the contract or not grow sugar beets [VI—73];

(d) they no longer competed as to the price to be paid sugar beet growers [IX—T. 78];

(e) they fixed and maintained the price to be paid sugar beet growers [IX—T. 76];

(f) they no longer competed in interstate commerce as to the ability and efficiency of their respective manufacturing, sales or executive departments [IX—T. 76-77];

(g) they no longer endeavored to increase their sales returns and decrease their expenses as they formerly had done [XI—T. 78-9];

(h) they so conducted their interstate commerce without competition that they received less in sales return for sugar sold in interstate commerce and incurred more expense than they would have had there been competition [XII—T. 79];

(i) they operated as if they were one corporation owning and controlling all sugar-beet factories in Northern and Central California but with three completely separate overheads and none of the efficiency which consolidation into one corporation might bring [XII—T. 79-80].

As a result of this conspiracy plaintiffs were damaged. The complaint alleges: [XVIII—T. 85-6].

“Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, plaintiff Mandeville Island Farms, Inc. would have received at least \$105,014.60 more, and plaintiff Roscoe C. Zuckerman would have received \$37,397.38 more than each did receive under said contracts, and plaintiffs respectively sustained damages accordingly.”

We respectfully submit that a mere reading of the complaint shows that the courts below erred. However, from an abundance of caution, we will particularize upon our position and analyze the factors that led the lower courts into error.

3. The Courts Below Erred in Holding That the Price-Fixing Combination Herein Involved Did Not Come Under The Sherman Act.

The courts below held that the processing of the beets into sugar broke the chain of interstate commerce. This was in error for *anyone* of six reasons each of which we shall discuss.

A. The Contract Between the Growers and the Refinery Provided that the Price To Be Paid by the Refinery to the Grower for the Beets Was Fixed by the Returns Secured by the Refinery From the Interstate Sale of the Processed Product. Until the Sugar Was Sold in Interstate Commerce, the Amount To Be Paid the Grower Could Not Be Determined. Therefore, Interstate Commerce Was Involved.

This price provision brought the entire contract into interstate commerce; if it were removed, there would be no contract, because there would be no method whatsoever for determining the price to be paid the grower for his beets. Yet the courts below ignored this provision and decided the case as if the contract were one completely carried out within a state with no relationship between the price to be paid the grower and the sale of the processed product in interstate commerce. In so doing the court erred. (*American Tobacco Co. v. U. S.*, 328 U. S. 781; *U. S. v. South-Eastern Underwriters Ass'n.*, 322 U. S. 533, 546; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 297; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38.)

B. Under the Contract the Grower Was Really Selling Sugar to the Refinery Because It Was Only the Sugar in the Beets for Which He Was Paid. This Sugar, When Extracted, Was Sold in Interstate Commerce. This Latter Sale determined the Price Paid the Grower for the Beets. Therefore, Interstate Commerce Was Involved.

The grower was not paid X dollars per ton for his beets—the price paid him was determined by the sugar content of the beets and the net price received by the refiners from the sale in *interstate commerce* of the raw sugar during the crop year.

The true perspective must be drawn from the whole picture, not from an isolated, local transaction. (*U. S. v. General Motors Corporation*, 121 Fed. (2d) 376, 401; *U. S. v. South-Eastern Underwriters Ass'n.*, 322 U. S. 533, 546; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.) All interstate commerce takes place within the confines of the states and necessarily involves incidents occurring within each state through which it passes or with which it is connected. Such incidents taking place within a state cannot be segregated “by an act of mental gymnastics” by labeling them as separate or direct or local. (*Nippert v. Richmond*, 327 U. S. 416.)

In *United States v. South-Eastern Underwriters Association*, 322 U. S. 533, 546, the Court said:

“We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce.

"But it does not follow from this that the court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce. Only by treating the Congressional power over commerce among the states as a 'technical legal conception' rather than as a 'practical one, drawn from the course of business' could such a conclusion be reached. . . . In short, a nation-wide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce."

The contract herein was clearly one involving interstate commerce. (*American Tobacco Co. v. U. S.*, 328 U. S. 781; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 297; *Currin v. Wallace*, 306 U. S. 1; *U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533; *Walling v. Amidon*, C. C. A. 10th, 153 Fed. (2d) 159; *Fitch v. Kentucky-Tenn. Light & Power Co.*, C. C. A. 6th, 137 Fed. 12; *Armour v. Wanstock*, 323 U. S. 126; *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726; *Roland Elec. Co. v. Walling*, 326 U. S. 657; *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173; *Borden Co. v. Borella*, 325 U. S. 679; *Boutelle v. Walling*, 327 U. S. 463.) The courts below erred in not so holding.

C. The Complaint Specifically Alleged that the Various Steps Involved in the Production of Beet Sugar, From the Preparation of the Ground for Planting of the Seed to the Sale in Interstate Commerce of the Extracted Sugar, Were "Inextricably Intermingled With and Directly Affected by Each Other" and Were "Part of One Transaction." Therefore, Interstate Commerce Was Involved.

Paragraph 5 of the complaint [T. 70-71] specifically alleged that the various steps involved in the production of beet sugar, from the preparation of the ground for planting to the sale in interstate commerce of the extracted sugar, were inextricably intermingled with and directly affected by each other and were part of one transaction. Since this case involved the granting of a motion to dismiss on the grounds that the complaint did not state facts sufficient to constitute a claim, these allegations must be taken as true. (*Columbia Broadcasting System, Inc. v. U. S.*, 316 U. S. 407, 414.)

D. Products of the Farm Which Are Subsequently Manufactured or Processed Into Articles of Interstate Commerce Are Within the Reach of the Anti-Trust Act. Price-Fixing Is Illegal per se. A Combination Among Interstate Processors Fixing Prices To Be Paid to Local Producers for Their Products Is Reached by the Sherman Act if the Processed Product Is Intended to Cross State Lines.

The District Court's opinion which was adopted by the Circuit Court states that "products of a farm which are subsequently manufactured or processed into articles of commerce are beyond the reach of said (Sherman Act)". This is erroneous.

In *Schulte v. Gangi*, 326 U. S. 712 the court said:

"We find nothing in the case that lends any support to the suggestion that a manufacturer's intra-state delivery to other manufacturers for further processing and ultimate interstate distribution interrupts production for interstate commerce."

In *Wickard v. Filburn*, 317 U. S. 111; *Curriu v. Wallace*, 306 U. S. 1; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110; *American Tobacco Co. v. U. S.*, 328 U. S. 781, and *Corn Products Refining Company v. Federal Trade Commission*, 324 U. S. 726, the Supreme Court held that products of a farm that were subsequently manufactured or processed were within the reach of the commerce clause.

The Supreme Court in *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 465, said (emphasis added):

"With respect to the federal power to protect interstate commerce in the commodities produced, there is obviously no difference between coal mined or stone quarried and fruit and *vegetables grown*. The same principle must apply and has been applied to injurious restraints of interstate trade which are caused by the practices of *manufacturers and processors*."

In *Curriu v. Wallace*, 306 U. S. 1, 10; *Mulford v. Smith*, 307 U. S. 38, 47, and *U. S. v. Rock Royal Coop. Inc.*, 307 U. S. 533, the Court held: "Where commodities are bought for use beyond state lines," the sale is a part of interstate commerce.

American Tobacco Co. v. U. S., 328 U. S. 781 and companion cases involved the Big Three Tobacco companies (American Tobacco Company, Liggett & Myers

Tobacco Company and R. J. Reynolds Tobacco Company). They sold from 70% to 80% of the country's cigarettes, a product manufactured from the tobacco purchased from the growers in "local" auctions. They were accused of conspiring to fix prices and to exclude undesirable competition against them in the purchase of domestic type of flue cured tobacco and burley tobacco, the raw materials essential to the production of cigarettes sold by them. The court pointed out the following restraints of trade directed against the grower:

- (1) The Big Three refused to purchase tobacco on a local market unless all three were present.
- (2) One would not participate in new local markets unless the other two were present.
- (3) Each placed limitations and restrictions on the prices their buyers were permitted to pay at local auctions and each put on the same ceiling.
- (4) Grades were formulated by the three, which resulted in the absence of competition.

The Big Three of the tobacco industry controlled from 70% to 80% of the cigarette market. The Big Three of the sugar beet industry controlled 100% of the sugar refining industry of Northern and Central California. The tobacco Big Three purchased leaf tobacco which had to be processed into cigarettes. None of the purchased leaf tobacco was sold as such by the Big Three. The sugar beet Big Three purchased sugar beets which had to be processed into sugar. None of the purchased sugar beets were sold as such by this Big Three.

The tobacco Big Three were convicted of violation of the Sherman Act by conspiring to control local prices paid

to local farmers who produced their tobacco locally and who sold it locally to a purchaser who manufactured it into cigarettes which were sold in interstate commerce. The sugar-beet Big Three likewise conspired to control prices paid to local farmers who produced their beets locally and sold them locally to purchasers who manufactured them into sugar sold in interstate commerce. The sugar beet Big Three are also guilty of violating the Sherman Act.

As the Supreme Court said in the tobacco case: "It is not the form of combination but the result to be achieved the statute condemns."

The tobacco case cannot be distinguished from the case at bar and the courts below erred in holding that the products of a farm, which are subsequently processed into articles of commerce, are beyond the reach of the Sherman Act.

The conspirators herein fixed and maintained the prices to be paid the growers. They refused to sell seed or to take beets from any grower except on the prices and terms the conspirators had agreed upon in advance. The growers could get no seed from any other source and could sell their beets commercially to no one else, because the conspirators had a complete monopoly of sugar-beet seeds and of sugar-beet refining in Northern and Central California.

Price fixing and price maintenance combinations, reasonable or unreasonable, are illegal *per se* under the Sherman Act, whether local or wholesale prices are involved. (*U. S. v. Frankfort Distilleries*, 324 U. S. 293, 296; *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 212, 213;

U. S. v. Masonite Corp., 316 U. S. 265, 274; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.)

Nevertheless, the courts below held that the law was not violated, despite the price fixing and price maintenance combination, because the purchase of the beets was a "local" affair. This is directly contrary to the holding of the Supreme Court in *U. S. v. Frankfort Distilleries*, 324 U. S. 293, where the court, in discussing the fixing of local prices, said at page 297 (emphasis added):

"These two questions thus posed relate to the extent of the Sherman Act's application to trade restraints resulting from actions which take place within a state. In resolving them, there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the state.

The sole ultimate object of respondent's combination in the instant case was price fixing or price maintenance. And with reference to commercial trade restraints such as these, Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it exercised all the power it possessed.

"The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act; retail outlets have ordinarily been the object of illegal price maintenance."

The Sherman Act has repeatedly been held by the Supreme Court to apply to the fixing of local or retail prices. (*U. S. v. Univis Lens Co.*, 312 U. S. 241, 253; *Ethyl Gasoline Corporation v. U. S.*, 309 U. S. 436; *Dr. Miles*

Medical Co. v. John D. Park & Sons, 220 U. S. 373; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720, and *American Tobacco Co. v. U. S.*, 328 U. S. 781.)

The courts below ignored these cases and applied to the Sherman Act the long discarded mechanical tests of "manufacture," "production" and "local". They erred in so doing.

E. Plaintiffs' Cause of Action Does Not Depend on Plaintiffs Being Engaged in Interstate Commerce, Because the Price-Fixing Acts Complained of Were a Part of the Conspirators' Interstate Commerce.

American Tobacco Co. v. U. S., 328 U. S. 781;

U. S. v. Bausch & Lomb Optical Co., 321 U. S. 707, 720;

U. S. v. Frankfort Distilleries, 324 U. S. 293;

Currin v. Wallace, 306 U. S. 1;

U. S. v. Wrightwood Dairy Co., 315 U. S. 110, 120.

"The Sherman Act denounced every conspiracy in restraint of trade, including those carried on by acts constituting intrastate commerce."

Local 167 v. U. S., 291 U. S. 293, 297.

"Competitive practices which are wholly intrastate may be reached by the Sherman Act because of their injurious effect on interstate commerce."

U. S. v. Wrightwood Dairy Co., 315 U. S. 110, 120.

"Where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation."

Currin v. Wallace, 306 U. S. 1;

U. S. v. Rock Royal Coop., Inc., 307 U. S. 533.

Congressional power over interstate commerce reaches back to the steps prior to transportation in interstate commerce.

U. S. v. Darby, 312 U. S. 100, 117;

Cloverleaf Butter Co. v. Patterson, 315 U. S. 148, 154.

"Congressional authority to protect interstate commerce is not limited to transactions which can be termed an essential part of a flow of interstate or foreign commerce."

Activities intrastate in character, when separately considered, come under the Commerce Clause if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions. (*N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36, 37; *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 465, 466; *U. S. v. Darby*, 312 U. S. 100, 122; *Wickard v. Filburn*, 317 U. S. 111.)

Most interstate commerce takes place within the confines of the states and necessarily involves incidents occurring within each state through which it passes or with which it is connected in fact. Such incidents cannot be segregated by an act of mental gymnastics by labeling them as "separate and distinct" or "local."

Nippert v. Richmond, 327 U. S. 416.

F. If Respondent Refiner Had Itself Grown the Beets Besides Refining Them and Selling the Sugar, Each Step Would Have Been Part of the Stream of Interstate Commerce. This Stream Was Not Broken Because an Independent Contractor Performed Some of the Steps.

In *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173, the Court said:

"If the services rendered in this case had been rendered by employees of respondent's customers engaged in the production of goods for interstate commerce, those employees would have come under the Act." (The Fair Labor Standards Act of 1938.)

"Respondent's employees are not to be excluded from such coverage merely because their employment to do the same work was under independent contracts. *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517; *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, 90."

See, also:

Walling v. Amidon (C. C. A. 10th), 153 F. (2d) 159, 161.

Roland Electric Co. v. Walling, 326 U. S. 657, involved a Maryland corporation doing business only in Maryland in wiring and installing motors for industrial uses engaged in interstate commerce. The Supreme Court pointed out that if Roland Electric had not done the work, the industrial users would have had to do it themselves, and therefore Roland Electric was engaged in "the production of goods for commerce." So, here, if plaintiffs had not planted the seed (bought from respondent), raised the beets, and delivered them to respondent to be processed into sugar to be sold in interstate commerce, respondents would have had to do those acts themselves. Therefore, plaintiffs were engaged "in production of goods for commerce," and the Sherman Act applied.

4. **The Courts Below Erroneously Held That Appellants, Although Damaged by the Price-Fixing Conspiracy Could Not Recover Because Some Other Farmers Were Not Damaged to the Same Extent.**

The District Court in its Opinion stated:

"From the complaint it appears that the net result of the conspiracy was that all growers in said area received the same price for their sugar beets and while the plaintiffs may have suffered a detriment, growers delivering their beets to other sugar refineries received an advantage."

There is no basis in the record for this statement.

It is true that the result of the conspiracy was that all growers in the district received the same price for the same product, *regardless of with which refinery they dealt*. That alone rendered the combination illegal. But that does not mean that certain growers received more than they would otherwise have received. All growers, as a result of the conspiracy, lost the advantages of competition because the refineries "no longer competed with any of the other manufacturers . . . as to efficiency of sales or manufacturing organizations" [Comp., Par. IX-c, T. 76-7]. "Defendant as a result of said conspiracy did not during said crop season of 1939, 1940 or 1941 conduct its interstate operations in as efficient and careful manner as it had prior thereto (when there was no conspiracy but there was competition between itself and the other manufacturers) or in as efficient or careful a manner as it would have, had said conspiracy not existed." [Comp., Par. XI, T. pp. 78-9].

This meant that all growers were damaged by the conspiracy but that plaintiffs and the other growers who

dealt with the most efficient of the three conspirators were damaged more than the rest, because they lost not only the advantage of competition but also the advantage of dealing with the most efficient of the three conspirators.

But even if some growers who dealt with one of the other conspirators received more for their sugar as a result of the price-fixing conspiracy than they otherwise would have received, the injury done plaintiffs and the other farmers who dealt with defendant is not excused. If it were, then price-fixing conspirators could with immunity injure or even wipe out one group after another as long as all groups were not affected at once.

Price-fixing agreements are illegal *per se* and "it is no excuse for monopolizing a market that the monopoly has not been used to extract from the consumer more than a fair profit." (*U. S. v. Aluminum Co. of America*, 148 Fed (2d) 416.)

In *American Tobacco Co. v. U. S.*, 328 U. S. 781, the Court stated:

"The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised or that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so."

Frequently conspirators have claimed that their conspiracy to restrain prices was justified because of the economic good the conspiracy achieved but just as frequently the Supreme Court has ruled that price-fixing agreements are illegal *per se* and that good motives or economic results are immaterial. (*U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 212, 213.) Price-fixing, reasonable or unreasonable, is unlawful *per se*. (*U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.)

5. **Trade Includes Both Buying and Selling. It Is No Excuse for Monopoly That Prices Are Not Raised to the Ultimate Consumer.**

In *Montrose Lumber Co. v. U. S.* (C. C. A. 10th, 1941), 124 Fed. (2d) 573, the Court said:

"It is true that in most cases of monopoly of trade, sellers and not buyers, are the actors. However, Sec. 2 of the Sherman Act embraces monopolies of trade and commerce among the several states by whomsoever effected. (577) . . . Trade necessarily involves both buying and selling and the control of either monopolizes trade" (p. 578).

In *White Bear Theatre Corp v. State Theatre Corp.*, (C. C. A. 8, 1942), 129 F. (2d) 600, the court said (p. 604):

"The competitive freedom of such markets in both buying and selling, is one of the principal things which the Sherman Act was intended to protect."

In *American Tobacco Co. v. U. S.*, 328 U. S. 781, the court said:

"The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised or that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so."

The decision in *U. S. v. Aluminum Co. of America*, 148 F. (2d) 416, which, has in effect been adopted by the Supreme Court as its own decision, stated:

"It is no excuse for 'monopolizing' a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit."

At page 445, the court stated:

"There remains only the question whether this assumed restriction had any influence upon prices. . . . To that *Socony-Vacuum Oil Co. v. United States*, 310 U. S. 150, 84 L. Ed. 1129, is an entire answer. It will be remembered that, when the defendants in that case protested that the prosecution had not proved that the 'distress' gasoline had affected prices, the court answered that that was not necessary, because an agreement to withdraw any substantial part of the supply from a market would, if carried out, have some effect upon prices, and was as unlawful as an agreement expressly to fix prices. The underlying doctrine was that all factors which contribute to determine prices, must be kept free to operate unhampered by agreements."

This decision in the *Aluminum* case is referred to by the Supreme Court in *American Tobacco Co. v. U. S.* (June 10, 1946), 328 U. S. 781, as a case decided "under unique circumstances which add to its weight as a precedent."

Paraphrasing the Circuit Court of Appeals for the Sixth Circuit, in *Fitch v. Kentucky-Tennessee Light and Power Co.*, 136 F. (2d) 12, we can say:

"Obviously, the price of the" (sugar beets) "directly affected the prices charged the consumers for" (raw sugar) "in various states."

In that case the coal produced by an intrastate operator and sold by him by local sales to be used to manufacture power, was held to be as much an element of the power as though it were a constituent part thereof—yet here the sugar beet, which was a constituent element of the sugar, was held not to be included within the interstate

commerce of which the sugar was a part. In *Walling v. Amidon*, (C. C. A. 10th), 153 F. (2d) 159, the intra-state producer of sand used to line troughs which carried molten metal to the furnaces of an interstate steel producer, was held to be the producer of goods for commerce. Yet here the production of sugar beets from which the interstate commodity sugar was extracted was held to be a local product, not reached by the Commerce Clause.

6. The District Court Relied Upon the 1886 Decision of *Coe v. Errol* (a Tax Case) and Upon Cases Following *Coe v. Errol*. *Coe v. Errol* Is No Longer Any Authority on Cases Arising Under the Sherman Act. The Circuit Court of Appeals Stated: "We Do Not Approve the Citation of Tax Cases as Authority for Any Issue in this Case." But the Remaining Cases Cited by the District Court (and Approved by the Circuit Court of Appeals) Are, With One Exception, Cases That Rely Upon the Tax Case of *Coe v. Errol*. The Exception Is *Parker v. Brown*, Which Supports Appellants' and Not Respondent's Position. As a Result, the Decision of the Circuit Court of Appeals Has No Foundation of Authority Whatsoever.

The Opinion of the Circuit Court stated:

"We have carefully examined the opinion (of the District Judge) and approve it except in the instances hereinafter set forth. We do not approve the citation of tax cases as authority for any issue in the case, although their citation presents no inconsistency in the opinion."

The opinion of the District Court cited *Coe v. Errol*, 116 U. S. 517; *Crescent Cotton Oil Co. v. State of Mis-*

Mississippi, 257 U. S. 129; *Dothan Oil Mill Co. v. Espy*, 220 Ala. 605, 127 So. 178; *Utah-Idaho Sugar Co. v. Federal Trade Commission*, 22 F. (2d) 122, 125, and *Parker v. Brown*, 317 U. S. 341, 361.

Coe v. Errol, the case primarily relied upon by the District Court, is a tax case and therefore is not approved by the Circuit Court of Appeals. It was decided in 1886 and sets forth the law as to the power of a State to tax personal property that has not passed across the State line. Subsequent Supreme Court decisions have limited the effect of this case to situations involving local taxation or regulation and have held that the statements made therein do not apply to cases under the Sherman Act or the National Labor Relations Board Act (*Stafford v. Wallace*, 258 U. S. 495, 525; *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 466. *Coe v. Errol* was cited by the majority in *Carter v. Carter Coal Co.*, 298 U. S. 238, with Justices Cardozo, Brandeis and Stone dissenting, but the Supreme Court has subsequently held that *Carter v. Carter Coal Co.* does not state the law in so far as the Sherman Act and the N. L. R. B. Act are concerned. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381; *U. S. v. Darby*, 312 U. S. 100, 122. See discussion in *Hamlet Ice Co. v. Fleming* (C. C. A. 4th), 127 F. (2d) 165, 169).

The Circuit Court of Appeals specifically stated: "We do not approve the citation of tax cases as authority for any issue in the case" and yet, out of five cases cited by the District Court on interstate commerce, one of them was a tax case, three of them relied upon that tax

case, and only one, *Parker v. Brown*, 317 U. S. 341, did not. *Parker v. Brown* is of no benefit to respondent.

It cited the *Crescent Cotton Oil Co.* case, at p. 360, as an example of the cases holding "that for purposes of local taxation or regulation, manufacture is not interstate commerce even though the manufacturing process is of slight extent." "But courts are not confined to so mechanical a test" (p. 362), and limited such cases to situations involving local taxation or regulation in matters involving the safety, health and well-being of local communities. Yet the courts below erroneously applied such cases to the Sherman Act.

The opinion of the Circuit Courts of Appeals, therefore, stands in the paradoxical position of holding that tax cases are not "authority for issues in this case" and at the same time relying entirely upon cases which in turn rely upon those very tax cases!

Crescent Cotton Oil Co. v. State of Mississippi was a 1921 decision which relied primarily on *Coe v. Errol* and laid down the rule "that manufacture is not commerce and the fact that an article is intended for export to another state does not render it an article of interstate commerce."

This 1921 rule is not the law today and it has been specifically repudiated by the U. S. Supreme Court in *Wickard v. Filburn*, 317 U. S. 111; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110; *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726; *U. S. v. Darby*, 312 U. S. 100; *U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533; *Currin v. Wallace*, 306 U. S. 1, 12; *Mulford v. Smith*, 307 U. S. 38, 47, etc. *Wickard v. Filburn* held

that the "mechanical application of legal formulas" (such as set forth in the cases cited by the District Judge) is "no longer feasible" (p. 124) and that the "few dicta and decisions of this Court which might be understood to lay it down that activities such as 'production,' 'manufacturing' and 'mining' are strictly local and . . . cannot be regulated under the commerce power . . . are not the law today." But the Circuit Court, by adopting the decision of the District Court has held that such dicta and decisions are the law today in the Ninth Circuit! The same case said: "Whether the subject of the regulation in question was 'production,' 'consumption' or 'marketing' is, therefore, not material for purposes of deciding the question of Federal power" *The very question that the Supreme Court held "not material for purposes of deciding the question of Federal power" was the very one used by the courts below for deciding the question!*

Dothan Oil Mill Co. v. Espy, 220 Ala. 605, 127 So. 178, cited by the District Court, is another of the earlier cases applying the *Coe v. Errol* doctrine of the tax cases. In that case certain cotton ginneries were charged in the state court in 1938 with conspiracy to restrain trade. The defendants seeking to avoid liability claimed that the matter came within the exclusive jurisdiction of the Federal Trade Commission. The Alabama Court upheld the state's jurisdiction. If that case is authority for the proposition that the Federal courts did not have jurisdiction over the facts therein set forth, then it is contrary to *Wickard v. Filburn*, 317 U. S. 111; *U. S. v. Wrightwood Dairy Co.*,

315 U. S. 100; *Curran v. Wallace*, 306 U. S. 1; *American Tobacco Co. v. U. S.*, 328 U. S. 781, and numerous other cases we have cited.

The District Court cited *Utah-Idaho Sugar Co. v. Federal Trade Commission*, 22 F. (2d) 122. This was decided in 1927 before the Supreme Court had expanded the application of the exercise of power under the Commerce Clause. The first authority it cited was the tax case of *Coe v. Errol*. The *Utah-Idaho Sugar Co.* case is not the law today. In *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, the Supreme Court specifically held that the intrastate sale of dextrose used to manufacture candy was subject to the Federal Trade Commission Act where the dextrose was used to manufacture candy sold in interstate commerce. This case and *U. S. v. Darby*, 312 U. S. 100, have in effect overruled the doctrine of the *Utah-Idaho Sugar Co.* case.

Winslow v. Federal Trade Commission (C. C. A. 4th), 277 Fed. 206, was another Circuit Court of Appeals case which had followed the tax cases and reached the same result as did the Court in the *Utah-Idaho Sugar Co.* case and the Courts below. But in a later decision of the Fourth Circuit (*Hamlet Ice Co. v. Fleming*, 127 F. (2d) 165), the Court pointed out at page 169 that *U. S. v. Darby*, 312 U. S. 100, had changed the law as expressed in the *Winslow* case by extending the application of the Commerce Clause to intrastate activities which affected interstate commerce.

7. The District Court Erroneously Held That Farmers Who Either Had to Sign the Crop Contract Prepared by the Conspirators or Not Grow Any Sugar at a Time When Sugar Was Vitally Needed by This Nation, Were in Pari Delicto and Could Not Recover Because They "Joined the Conspiracy and Furthered the Object of the Same" by Signing the Contract. The Circuit Court of Appeals, Instead of Repudiating Such a Holding Stated: "We Do Not Reach and Therefore Make No Expression Upon This Claim." The Circuit Court of Appeals Erred in so Doing. The Doctrine Enunciated by the District Court Would Result in Making "Private Remedies Under the Sherman Act Illusory if Not Non-Existent for Many, Perhaps Most, Victims of Restraint of Trade." The Circuit Court of Appeals Should Not Have Remained Passive When Faced With Such a Doctrine but Should Have Definitely Repudiated It. This Court Should Establish Uniformity by Repudiating the District Court's Doctrine.

Plaintiffs, faced with the choice of either not growing sugar beets or signing one of the conspirators' contracts, signed the contracts, secured the seed, grew the sugar beets, and delivered them to the only manufacturing source available, one of the conspirators' refineries. The district judge held that this made the farmers co-conspirators.

Even if the plaintiffs knew of the conspiracy, they could nevertheless recover. From the days of Lord Mansfield (*Browning v. Morris* (1778), 98 Eng. Reprint, 1364), it has been uniformly held that "where contracts or transactions are prohibited by positive statute for the sake of protecting one set of men from another set of

men, the one, from their situation and condition, being liable to be oppressed or imposed upon by the other, there the parties are not *in pari delicto*." (See, also, 12 Am. Jur. 735, Sec. 218; *McAllister v. Drapeau* (1939), 14 Cal. (2d) 102, 112.)

In *Eastman Kodak Co. v. Southern Photo Material Co.*, 273 U. S. 359, it was held that where a plaintiff "had complied with the defendant's restrictive terms of sale merely for the reason that otherwise he could not purchase or secure the goods necessary for the conduct of its business" he was not *in pari delicto*.

This was followed in *Rankin v. Associated Bill Posters*, 42 F. (2d) 152, 155 (cert. den. 282 U. S. 864); *Hartford Empire Co. v. Glenshaw Glass Co.*, 47 Fed. Supp. 710, 711, and *Ring v. Spina* (C. C. A. 2d, 1945), 148 F. (2d) 647, 652. See, also, *Sala Electric Co. v. Jefferson etc. Co.*, 317 U. S. 173.

Ring v. Spina presents a situation almost identical with the one at bar. There the plaintiff sued under the Sherman Act, alleging that the restraint of trade was accomplished by means of the agreement of the Dramatists Guild. Plaintiff signed it because otherwise he could not have produced his play. The District Court held, as did the district judge, here, that by signing the agreement the plaintiff became *in pari delicto*. This was reversed by the Second Circuit, which stated, 148 F. (2d) 647, 652:

"It is well settled that where one party to an illegal contract acts under the duress of another the parties are not *in pari delicto*. (Citing authorities.)

And in actions for triple damages under the Sherman Act a showing of economic duress similar to that asserted here has been held sufficient proof that the

plaintiff is not a party to the monopoly. (Citing cases.)

"But here even without a showing of economic coercion as the final step in forcing him to sign the Basic Agreement, plaintiff is precisely the type of individual whom the Sherman Act seeks to protect from combinations fashioned by others and offered to such individual as the only feasible method by which he may do business. Considerations of public policy demand court intervention in behalf of such a person, even if technically he could be considered in *pari delicto*. Indeed, this is a general principle applicable beyond the anti-trust field. (Citing cases.)

Any other conclusion would mean that for many, perhaps most, victims of restraint of trade, private remedies under the Sherman Act would be illusory, if not quite non-existent."

Faced with this doctrine, which as the Second Circuit said, means "that for many, perhaps most, victims of restraint of trade, private remedies under the Sherman Act would be illusory, if not quite non-existent," the Circuit Court of Appeals remained passive and said: "We do not reach and therefore make no expression upon this claim."

We respectfully submit that such doctrine should have been repudiated instead of being permitted to remain as the rule of the Southern District of California, and that the Supreme Court, in order to secure uniformity within the circuits and to protect victims of restraint of trade should apply the *Ring v. Spina* doctrine in this case. This issue of law must be determined in view of the District Judge's ruling, and this is the logical time and place for that determination.

IV—CONCLUSION.

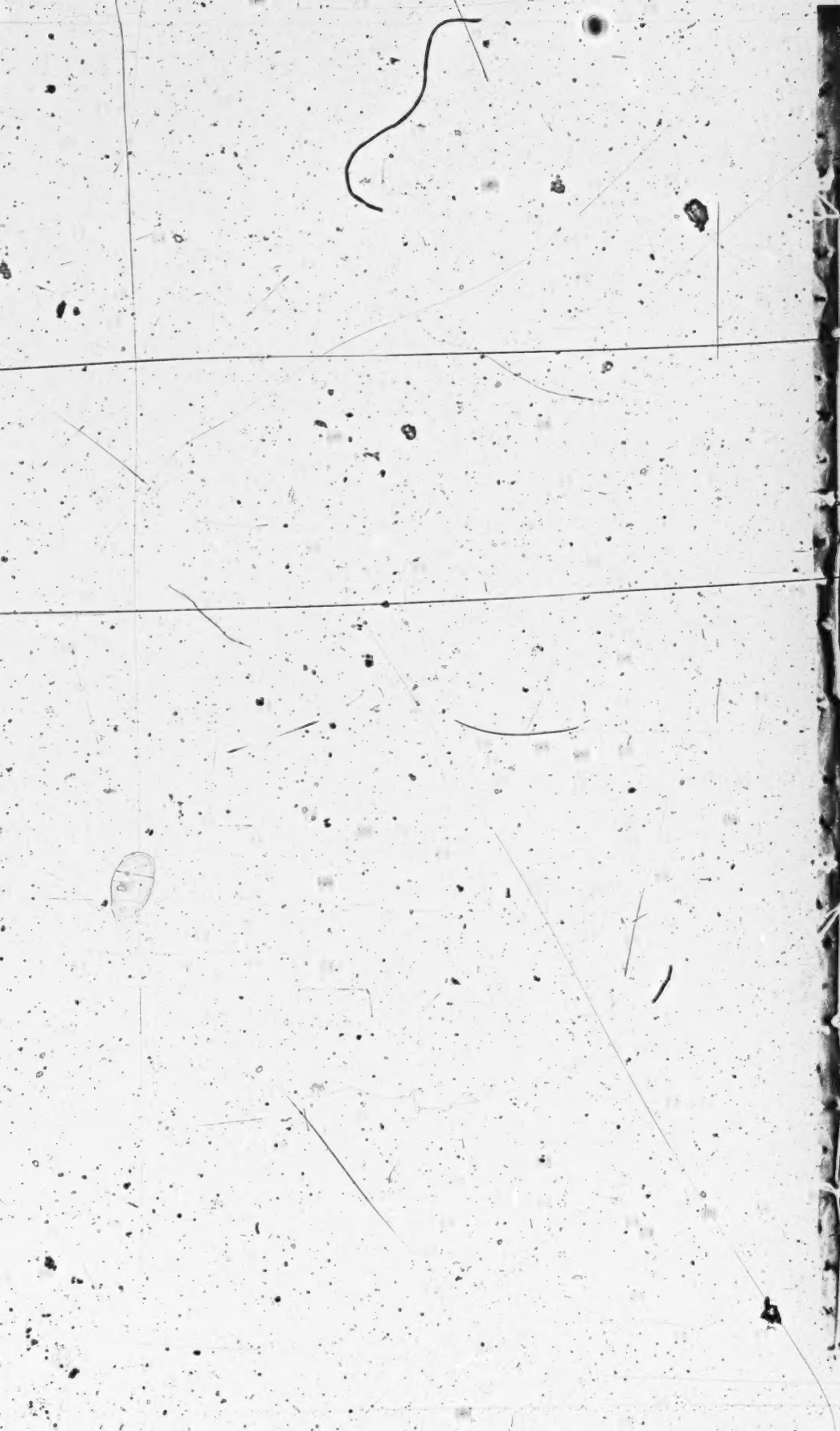
If the decision of the Circuit Court of Appeals remains as the law in the Ninth Circuit, the farmers of that vast area will be deprived, for all practical purposes, of the benefits of the Sherman Act; they will be helpless before the price-fixing and price-maintenance conspiracies and monopolies of refineries, packers, canners and processors, who can adopt the technique used by the conspiring sugar refiners herein of fixing prices and conspiring as to farmers, state by state, as long as they restrict their processing, canning, packing, refining, etc., to the state in which the products was produced by the farmers before shipping the completed product into interstate commerce.

We respectfully submit that such is not the law as enunciated by the Supreme Court of the United States for many years and that the Petition for Writ of Certiorari should be granted and that upon hearing thereof the Judgment of the Circuit Court of Appeals and the District Court should be reversed and the doctrine of the *Big Three Tobacco Companies* cases should be made applicable to the Ninth Circuit as well as the rest of the country.

Respectfully submitted;

GUY RICHARDS CRUMP,

Attorney for Petitioners.



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CHARLES ELMORE PROFFLY
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IN THE
Supreme Court of the United States

October Term, 1946.

No. 75

MANDEVILLE ISLAND FARMS, INC., a Corporation, and
ROSCOE C. ZUCKERMAN,

Petitioners,

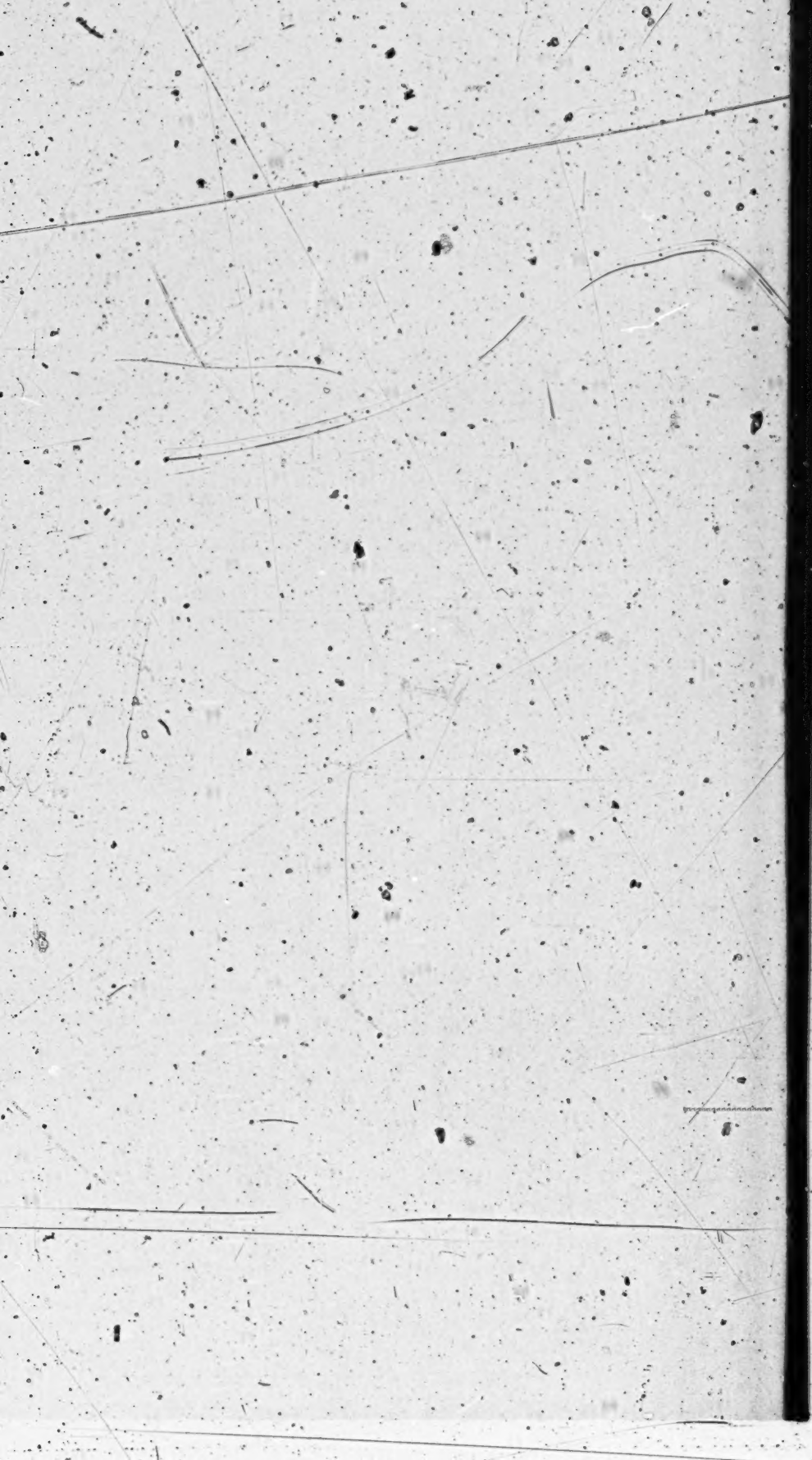
vs.

AMERICAN CRYSTAL SUGAR COMPANY, a Corporation,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS,

GUY RICHARDS CRUMP,
535 Rowan Building, Los Angeles 13,
Attorney for Petitioners.



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1. The courts below held that a conspiracy to fix and maintain prices in restraint of trade, which damaged plaintiffs, was alleged but that the Sherman Act was not violated on the ground that "production" and "manufacture" were "local" and not interstate. A mere reading of the complaint shows that the courts below erred. Causes of action are stated under both Sections 1 and 2 of the Act 7
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4. The courts below erred in holding that the price-fixing monopoly herein involved did not come under the Sherman Act 17.

A. The contract between the growers and the refinery provided that the price to be paid by the refinery to the grower for the beets was fixed by the returns secured by the refinery from the interstate sale of the processed product. Until the sugar was sold in interstate commerce, the amount to be paid the grower could not be determined. Therefore, interstate commerce was involved 17

B. Under the contract the grower was really selling sugar to the refinery because it was only the sugar in the beets for which he was paid. This sugar, when extracted, was sold in interstate commerce. This latter sale determined the price paid the grower for the beets. Therefore, interstate commerce was involved 18

C. The complaint specifically alleged that the various steps involved in the production of beet sugar, from the preparation of the ground for planting of the seed to the sale in interstate commerce of the extracted sugar, were "inextricably intermingled with and directly affected by each other" and were "part of one transaction." Therefore, interstate commerce was involved 20

D. Products of the farm which are subsequently manufactured or processed into articles of interstate commerce are within the reach of the Anti-Trust Act. Price-fixing is illegal per se. A combination among interstate processors fixing prices to be paid to local producers for their products is reached by the Sherman Act if the processed product is intended to cross state lines 20

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IN THE
Supreme Court of the United States

October Term, 1946.

No. 1300.

MANDEVILLE ISLAND FARMS, INC., a Corporation, and
ROSCOE C. ZUCKERMAN,

Petitioners,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a Corporation,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS.

I.

INTRODUCTORY MATTER.

1. Opinions Below.

The opinion of the District Court is printed in 64 Fed. Supp. 265, and in the Transcript at pp. 100-108. The Circuit Court of Appeals *per curiam* opinion is printed in 159 F. (2d) 71, and in the Transcript at pp. 120-121. Its order denying petition for rehearing was without opinion, and appears in the Transcript at p. 123.

2. Jurisdiction.

The judgment of the Circuit Court of Appeals was filed January 14, 1947; Petition for Rehearing was filed February 12, 1947; the Order denying it was filed March 27, 1947. The Petition for Certiorari was filed within three months of the filing of said Order. The jurisdiction of the Supreme Court was invoked under Sec. 240-a of the Judicial Code of the United States, as amended by Act of February 13, 1925 (28 U. S. C., Sec. 347a). Writ of Certiorari was granted June 2, 1947.

3. Questions Presented.

These were set forth in the Petition for Writ of Certiorari, and are incorporated herein by reference.

4. Statutes Involved.

This is an action brought by persons injured in their business and property by reason of acts forbidden in the Anti-Trust Laws of the United States (15 U. S. C. A., Sees. 1, 2, 7, 15), commonly called the "Sherman Act," and brought in the District in which defendant is found and has an agent, to recover threefold damages.

5. Statement of the Case.

This was set forth in the Petition for Writ of Certiorari, and is incorporated herein by reference.

6. Specifications of Error to Be Urged.

This was set forth in the Petition and is incorporated herein by reference.

SUMMARY OF ARGUMENT.

Appellant's argument can be summarized by setting forth the headings used in the brief:

1. The courts below held that a conspiracy to fix and maintain prices in restraint of trade, which damaged plaintiffs, was alleged but that the Sherman Act was not violated on the ground that "Production" and "Manufacture" were "Local" and not interstate. A mere reading of the complaint shows that the courts below erred. Causes of action are stated under both Sections 1 and 2 of the Act.
2. Congress in passing the Sherman Act left no area of its constitutional power unoccupied. It exercised all the power it possessed. The Sherman Act is a broad and comprehensive and not a limited act, as respondent contends.
3. Paragraphs 1 and 2 of the Sherman Act have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole.
4. The courts below erred in holding that the price-fixing monopoly herein involved did not come under the Sherman Act.
 - A. The contract between the growers and the refinery provided that the price to be paid by the refinery to the grower for the beets was fixed by the returns secured by the refinery from the interstate sale of the processed product. Until the sugar was sold in

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interstate commerce, the amount to be paid the grower could not be determined. Therefore, interstate commerce was involved.

- B. Under the contract the grower was really selling sugar to the refinery because it was only the sugar in the beets for which he was paid. This sugar, when extracted, was sold in interstate commerce. This latter sale determined the price paid the grower for the beets. Therefore, interstate commerce was involved.
- C. The complaint specifically alleged that the various steps involved in the production of beet sugar, from the preparation of the ground for planting of the seed to the sale in interstate commerce of the extracted sugar, were "inextricably intermingled with and directly affected by each other" and were "part of one transaction." Therefore, interstate commerce was involved.
- D. Products of the farm which are subsequently manufactured or processed into articles of interstate commerce are within the reach of the Anti-Trust Act. Price-fixing is illegal *per se*. A combination among interstate processors fixing prices to be paid to local producers for their products is reached by the Sherman Act if the processed product is intended to cross state lines.
- E. Plaintiffs' cause of action does not depend on plaintiffs being engaged in interstate commerce, because the price-fixing acts com-

plained of were a part of the conspirators' interstate commerce.

- F. If respondent refiner had itself grown the beets besides refining them and selling the sugar, each step would have been part of the stream of interstate commerce. This stream was not broken because an independent contractor performed some of the steps.
5. The courts below erroneously held that appellants, although damaged by the price-fixing conspiracy, could not recover because some other farmers were not damaged to the same extent.
6. Trade includes both buying and selling. It is no excuse for monopoly that prices are not raised to the ultimate consumer. The Sherman Act protects buyers and sellers, consumers and producers, not merely consumers and buyers as respondent contends.
7. The District Court relied upon the 1886 decision of *Coe v. Errol* (a tax case) and upon cases following *Coe v. Errol*, in holding that production and manufacture of goods is not commerce. *Coe v. Errol* is no longer any authority on cases arising under the Sherman Act. The Circuit Court of Appeals stated:⁰ "We do not approve the citation of tax cases as authority for any issue in this case." But the remaining cases cited by the District Court (and approved by the Circuit Court of Appeals) are, with one exception, cases that rely upon the tax case of *Coe v. Errol*. The exception is *Parker v. Brown*, which supports appellants' and not respondent's

position. As a result, the decision of the Circuit Court of Appeals has no foundation of authority whatsoever.

8. Public interest is involved.
9. The claim is not a stale claim.
10. The District Court erroneously held that farmers who either had to sign the crop contract prepared by the conspirators or not grow any sugar at a time when sugar was vitally needed by this nation, were in *pari delicto* and could not recover because they "joined the conspiracy and furthered the object of the same" by signing the contract. Respondents made no effort to support this ruling before the Circuit Court of Appeals or in their brief in opposition to the granting of certiorari, but the Circuit Court of Appeals, instead of repudiating such a holding stated: "We do not reach and therefore make no expression upon this claim." The Circuit Court of Appeals erred in so doing: The doctrine enunciated by the District Court would result in making "Private remedies under Sherman Act illusory if not non-existent for many, perhaps most, victims of restraint of trade. Respondents conceded error by making no attempt to support the doctrine and not urging it on appeal. The Circuit Court of Appeals should not have remained passive when faced with such a doctrine but should have definitely repudiated it. This court should establish uniformity by repudiating the District Court's doctrine.

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III.

ARGUMENT OF PETITIONERS.

1. The Courts Below Held That a Conspiracy to Fix and Maintain Prices in Restraint of Trade, Which Damaged Plaintiffs, Was Alleged but That the Sherman Act Was Not Violated on the Ground That "Production" and "Manufacture" Were "Local" and Not Interstate. A Mere Reading of the Complaint Shows That the Courts Below Erred. Causes of Action Are Stated Under Both Sections 1 and 2 of the Act.

Since this is an appeal from an order granting a motion to dismiss the complaint on the ground that it did not state facts sufficient to constitute a claim upon which relief could be granted, the allegations of the complaint must be taken as true. (*Columbia Broadcasting System v. U. S.*, 316 U. S. 407, 414.) These are set forth in the Transcript, pages 68 to 96 and can be summarized as follows:

A. The steps involved in the interstate production of beet sugar (the growing, harvesting, and delivery of the beets to the refinery, the processing of the beets into sugar, and the sale and distribution of the raw sugar in interstate commerce to the ultimate consumer), were at all times herein mentioned inextricably intermingled with and directly affected by each other and had an immediate relation to each other. Each step was a part of a transaction which commenced when the ground was prepared for planting and which was completed when the sugar was used by the ultimate consumer. [V—T. 71.]. (Roman numerals refer to paragraph numbers of the amended complaint. T refers to the Transcript. The number which follows the T refers to Transcript page.)

B. Defendant and its two co-conspirators were engaged in *interstate* commerce in the selling of sugar-beet seeds, the refining of sugar beets into sugar, and the sale of the sugar throughout the country. [II—T. 68-69.].

C. The defendant and its two co-conspirators had a complete monopoly in the sale of sugar beet seeds and the manufacture of sugar beets into sugar in Northern and Central California. They owned and controlled all sugar beet factories there located. No growers of sugar beets in the area could sell sugar beets at a profit except to them. They had the only practical market available to beet growers in the area. [VI—T. 71-74.].

D. Up to and including the 1938 crop season, these three corporations competed with each other [X—T. 77-78], but in 1937 or 1938 they entered into a price-fixing conspiracy in restraint of trade and to create a monopoly [IX—T. 76-77], whereby, during the cropping years of 1939, 1940 and 1941,

(a) they adopted a uniform contract for growers which provided that the price to be paid the growers should be determined by an *identical* formula, under which the average net return received by *all* three conspirators from the sale of the raw sugar in interstate commerce, determined the price paid each grower regardless of with which conspirator the grower contracted. [IX—T. 77];

(b) they paid the same agreed price to all growers, which price was not a reasonable price [IX—T. 77];

(c) they refused to furnish seed (the supply of which they controlled) to, or buy sugar beets from any grower unless he would sign their uniform contract and the grower had either to sign the contract or not grow sugar beets [VI—T. 73];

(d) they no longer competed as to the price to be paid sugar beet growers [IX—T. 78];

(e) they fixed and maintained the price to be paid sugar beet growers [IX—T. 76];

(f) they no longer competed in interstate commerce as to the ability and efficiency of their respective manufacturing, sales or executive departments [IX—T. 76-77];

(g) they no longer endeavored to increase their sales returns and to decrease their expenses as they formerly had done [XI—T. 78-79];

(h) they so conducted their interstate commerce without competition that they received less in sales return for sugar sold in interstate commerce and incurred more expense than they would have had there been competition [XII—T. 79];

(i) they operated as if they were one corporation owning and controlling all sugar beet factories in Northern and Central California but with three completely separate overheads and none of the efficiency which consolidation into one corporation might bring [XII—T. 79-80].

E. As a result of this conspiracy plaintiffs were damaged. The complaint alleges [XVIII—T. 86-86]:

"Had it not been for said unlawful plan and conspiracy and if said sugar had been manufactured and sold in interstate commerce competition with the sugar of the co-conspirators, unhampered by said plan and conspiracy, plaintiff Mandeville Island Farms, Inc. would have received at least \$105,014.60 more, and plaintiff Roscoe C. Zuckerman would have received \$37,397.38 more than each did receive under said contracts, and plaintiffs respectively sustained damages accordingly."

(This is a proper measure of damages. *Story Parchment Co. v. Patterson Paper Co.*, 282 U. S. 555; *C. E. Stevens Co. v. Foster & Kleiser Co.*, 311 U. S. 252; *Addyston Pipe and Steel Co. v. U. S.*, 175 U. S. 211.)

The courts below held that no cause of action was stated and dismissed the complaint.

We respectfully submit that a mere reading of the complaint shows that the courts below erred and that causes of action are stated under both Sections 1 and 2 of the Sherman Act. However, from an abundance of caution, we will particularize upon our position.

2. Congress in Passing the Sherman Act Left No Area of Its Constitutional Power Unoccupied. It Exercised All the Power It Possessed. The Sherman Act Is a Broad and Comprehensive and Not a Limited Act as Respondent Contends.

As the Supreme Court stated in *U. S. v. Southeastern Underwriters Assn.*, 322 U. S. 533, 546:

"The real answer to the question before us is to be found in the Commerce Clause itself and in some of the great cases which interpret it. Many decisions make vivid the broad and true meaning of that clause."

Congress has passed various statutes under the Commerce Clause, but in passing the Sherman Act it "left no area of its constitutional power unoccupied; it exercised all the power it had." (*Atlantic Cleaners and Dyers, Inc. v. U. S.*, 286 U. S. 427, 435; *Apex Hosiery Company v. Leader*, 310 U. S. 469, 495; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 298. See also, *U. S. v. Darby*, 312 U. S. 100, limiting *Carter v. Carter Coal Co.*, 298 U. S. 238,

and holding (p. 122) that "The Sherman Act and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce.")

Respondents argued in their Brief in Opposition to Writ of Certiorari (p. 10 *et seq.*) that while the events here involved would be interstate commerce under the Fair Labor Standards Act, the National Labor Relations Act, the Packers and Stock Yards Act, the Tobacco Inspection Act, and the Agricultural Adjustment Act, such events are not interstate commerce under the Sherman Act, because the Sherman Act is an old act, never amended and because Congress, while having the power to include these events under the Sherman Act, did not exercise that power.

The same contention was unsuccessfully made in *U. S. v. Southeastern Underwriters Assn.*, 322 U. S. 533, where the Supreme Court stated, at page 553:

"We come then to the contention, earnestly pressed upon us by appellees, that Congress did not intend in the Sherman Act to exercise its power over the interstate insurance trade."

The court then stated:

"Certainly the Act's language affords no basis for this contention . . . Language more comprehensive is difficult to conceive. On its face it shows a carefully studied attempt to bring within the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.

"A general application of the Act to all combinations of business and capital organized to suppress

commercial competition is in harmony with the spirit and impulses of the times which gave it birth. 'Trusts' and 'monopolies' were the terror of the period So great was the strength of the anti-trust forces that the issue of trusts and monopolies became non-partisan. The question was not whether they should be abolished, but how this purpose could best be accomplished."

The court stated at page 556:

" . . . we fail to find in the legislative history of the Act an expression of a clear and unequivocal desire of Congress to legislate only within that area previously declared by this Court to be within the federal power We have been shown not one piece of reliable evidence that the Congress of 1890 intended to freeze the proscription of the Sherman Act within the mold of then current judicial decisions defining the commerce power. On the contrary, all the acceptable evidence points the other way. That Congress wanted to go to the utmost extent of its Constitutional power in restraining trust and monopoly agreements such as the indictment here charges, admits of little, if any doubt. The purpose was to use that power to make of ours, so far as Congress could under our dual system, a competitive business economy."

The courts below instead of applying the "great cases" which interpreted the Commerce Clause and which made "vivid the broad and true meaning of that clause," applied the outmoded "distinction between what has been called 'local' and what 'interstate,' a type of mechanical criterion which this court has not deemed controlling in the measurement of federal power." (*U. S. v. Southeastern Underwriters Assn.*, 322 U. S. 533, 546.)

Therefore, we will, in this brief, as did the Supreme Court in the *Southeastern Underwriters Assn.* case, cite as authority cases arising not only under the Sherman Act but also under various other acts passed by Congress under the Commerce Clause.

Respondents in their Brief in Opposition to Petition for Writ of Certiorari brush the latter cases aside on the ground that they are based on "regulatory statutes." Yet an analysis of *U. S. v. Southeastern Underwriters Assn.*, 322 U. S. 533, a Sherman Act case, shows that the Supreme Court cited far more non-Sherman Act cases in its opinion than it did Sherman Act cases.

Respondent in said Brief (p. 13) cites *Federal Trade Commission v. Bunte*, 312 U. S. 349 as authority for respondent's claim that "later and more detailed regulatory statutes afford no reliable guide for the interpretation of such earlier statutes as the Sherman Act, the Federal Trade Commission Act and the Clayton Act." Respondent has not correctly applied this case. It specifically refers to *U. S. v. Darby*, 312 U. S. 100, decided a few weeks previously. A reading of these two cases clearly shows that the Supreme Court held that "the Sherman Act and the National Labor Relations Board Act are familiar examples of the exercise of the commerce power to prohibit or control activities wholly intrastate because of their effect on interstate commerce." *U. S. v. Darby*, 312 U. S. 100, 120.

Respondent places great stress upon the fact that Sections 1 and 2 of the Sherman Act have not been amended, but appellant is blind to the "great changes and develop-

ment in the business of this country." In Note 27 to the decision of the Court in *U. S. v. Southeastern Underwriters Association* (322 U. S. 533, 547), the Court states:

"Appraising the Swift & Co. Case, Mr. Chief Justice Taft had this to say:

"That case was a milestone in the interpretation of the commerce clause of the Constitution. It recognized the great changes and development in the business of this vast country and drew again the dividing line between interstate and intrastate commerce where the Constitution intended it to be. *It refused to permit local incidents of great interstate movement, which taken alone were intrastate, to characterize the movement as such.* (Italics supplied.) The Swift & Co. Case merely fitted the commerce clause to the real and practical essence of modern business growth.' Board of Trade v. Olsen, 262 U. S. 1, 35, 67 L. ed. 839, 849, 43 S. Ct. 470."

Respondent and the courts below have ignored this judicial "milestone" and have disregarded these "great changes and development in the business of this vast country" and "the real and practical essence of modern business growth." They seek to "permit local incidents of great interstate movement to characterize the movement as intrastate," instead of drawing the line "where the Constitution intended it to be."

Judicial milestones should not be ignored.

3. Paragraphs 1 and 2 of the Sherman Act Have Both a Geographical and Distributive Significance and Apply to Any Part of the United States as Distinguished From the Whole.

The respondent herein and its co-conspirators had a complete monopoly of the sale of sugar beet seed and the refining of sugar beets into sugar in Northern and Central California. During the period covered by the conspiracy no farmer could purchase sugar beet seeds nor sell sugar beets except to one of the conspirators.

In *Indiana Farmers Guide Publishing Co. v. Prairie Farmer Publishing Co.*, 293 U. S. 268, the Circuit Court of Appeals had made the relation between the amount of advertising controlled by respondents and the total in the entire country the basis of its judgment. This the Supreme Court reversed, stating at page 278:

"But the complaint charges restraint and attempt to monopolize only in the territory served by respondent's publications, being five—or seven . . . out of a total of 23 papers in that territory . . . Its right to recover does not depend upon the proportion that respondents control of the total farm paper advertisements in the entire country, and it was not required to prove that respondents imposed a restraint or attempted monopolization that would affect all commercial advertisements in all farm paper, wherever published or circulated. The provisions of §§1 and 2 have both a geographical and distributive significance and apply to any part of the United States as distinguished from the whole and to any part of the classes of things forming a part of interstate commerce."

This rule has been repeatedly applied by the Supreme Court. (*U. S. v. Frankfort Distilleries*, 324 U. S. 293, which involved only Colorado; *Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797, which involved only New York City; *C. E. Stevens Co. v. Foster & Kleiser*, 311 U. S. 255, which involved the "Pacific Coast region"; *Interstate Circuit v. U. S.*, 306 U. S. 208, which involved only Texas and New Mexico; *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, which involved only Georgia; *United States v. Borden*, 308 U. S. 188, which involved Illinois, Indiana, Michigan and Wisconsin, and *American Medical Asso. v. U. S.*, 317 U. S. 519, which involved only the District of Columbia.)

Indiana Farmers Guide Publishing Co. v. Prairie Farmer Publishing Co., 293 U. S. 268, is also significant in view of the contention of respondents herein that no rise in price to the consuming public as such was shown. There was no claim in the *Indiana Farmers Guide Publishing Co.* case that any ultimate consumer or purchaser was affected. The sole claim was that one farm paper was unable to get advertising because its competitors joined in a conspiracy to give *lower prices* to advertising purchasers. Instead of increasing prices to advertising purchasers, prices were decreased.

In *Swift & Co. v. U. S.*, 196 U. S. 375, the Supreme Court pointed out at pages 396, 397:

"Although the combination alleged embraces restraint and monopoly of trade within a single state, its effect upon commerce among the states is not accidental, secondary, remote, or merely probable."

That quotation is particularly applicable herein.

4 The Courts Below Erred in Holding That the Price-Fixing Monopoly Herein Involved Did Not Come Under the Sherman Act.

The courts below held that the processing of the beets into sugar broke the chain of interstate commerce. This was in error for *any one* of six reasons each of which we shall discuss.

- A. The Contract Between the Growers and the Refinery Provided That the Price to Be Paid by the Refinery to the Grower for the Beets Was Fixed by the Returns Secured by the Refinery From the Interstate Sale of the Processed Product. Until the Sugar Was Sold in Interstate Commerce, the Amount to Be Paid the Grower Could Not Be Determined. Therefore, Interstate Commerce Was Involved.

This price provision brought the entire contract into interstate commerce; if it were removed there would be no contract, because there would be no method whatsoever for determining the price to be paid the grower for his beets. Yet the courts below ignored this provision and decided the case as if the contract were one completely carried out within a state with no relationship between the price to be paid the grower and the sale of the processed product in interstate commerce. In so doing the court erred. (*American Tobacco Co. v. U. S.*, 328 U. S. 781; *U. S. v. South-Eastern Underwriters Ass'n.*, 322 U. S. 533, 546; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 297; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720; *W. W. Montague & Co. v. Lowry*, 193 U. S. 38.)

B. Under the Contract the Grower Was Really Selling Sugar to the Refinery Because It Was Only the Sugar in the Beets for Which He Was Paid. This Sugar, When Extracted, Was Sold in Interstate Commerce. This Latter Sale Determined the Price Paid the Grower for the Beets. Therefore, Interstate Commerce Was Involved.

The grower was not paid X dollars per ton for his beets—the price paid him was determined by two variables, (a) the sugar content of the beets and (b) the net price received by the refiners from the sale in *interstate commerce* of raw sugar during the crop year.

The true perspective must be drawn from the whole picture, not from an isolated, local transaction. (*U. S. v. General Motors Corporation*, 121 F. (2d) 376, 401; *U. S. v. South-Eastern Underwriters Ass'n.*, 322 U. S. 533, 546; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.) All interstate commerce takes place within the confines of the states and necessarily involves incidents occurring within each state through which it passes or with which it is connected. Such incidents taking place within a state cannot be segregated “by an act of mental gymnastics” by labeling them as “separate” or “direct” or “local.” (*Nippert v. Richmond*, 327 U. S. 416.)

In *U. S. v. Southeastern Underwriters Assn.*, 322 U. S. 533, 546, the Court held that the “distinction between what has been called ‘local’ and what ‘interstate’” is “a type of mechanical criterion which this Court has not deemed controlling in the measurement of federal power” and said:

“We may grant that a contract of insurance, considered as a thing apart from negotiation and execution, does not itself constitute interstate commerce.

"But it does not follow from this that the court is powerless to examine the entire transaction, of which that contract is but a part, in order to determine whether there may be a chain of events which becomes interstate commerce. Only by treating the Congressional power over commerce among the states as a 'technical legal conception' rather than as a 'practical one, drawn from the course of business' could such a conclusion be reached In short, a nation-wide business is not deprived of its interstate character merely because it is built upon sales contracts which are local in nature. Were the rule otherwise, few businesses could be said to be engaged in interstate commerce."

The contract herein was clearly one involving interstate commerce. (*American Tobacco Co. v. U. S.*, 328 U. S. 781; *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 297; *Currin v. Wallace*, 306 U. S. 1; *U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533; *Walling v. Amidon* (C. C. A. 10), 153 F. (2d) 159; *Fitch v. Kentucky-Tenn. Light & Power Co.* (C. C. A. 6th), 137 Fed. 12; *Armour v. Wanstock*, 323 U. S. 126; *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726; *Roland Elec. Co. v. Walling*, 326 U. S. 657; *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173; *Borden Co. v. Borella*, 325 U. S. 679; *Boutelle v. Walling*, 327 U. S. 463; *Ramsey v. Associated Billposters of U. S.*, 260 U. S. 501; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707.) The courts below erred in not so holding.

C. The Complaint Specifically Alleged That the Various Steps Involved in the Production of Beet Sugar, From the Preparation of the Ground for Planting of the Seed to the Sale in Interstate Commerce of the Extracted Sugar, Were "Inextricably Intermingled With and Directly Affected by Each Other" and Were "Part of One Transaction." Therefore, Interstate Commerce Was Involved.

Paragraph 5 of the complaint [T. 70-71] specifically alleged that the various steps involved in the production of beet sugar, from the preparation of the ground for planting to the sale in interstate commerce of the extracted sugar, were inextricably intermingled with and directly affected by each other and were part of one transaction. Since this case involved the granting of a motion to dismiss on the grounds that the complaint did not state facts sufficient to constitute a claim, these allegations must be taken as true. (*Columbia Broadcasting System, Inc. v. U. S.*, 316 U. S. 407, 414.) The Sherman Act therefore applied.

D. Products of the Farm Which Are Subsequently Manufactured or Processed Into Articles of Interstate Commerce Are Within the Reach of the Anti-Trust Act. Price-Fixing Is Illegal Per Se. A Combination Among Interstate Processors Fixing Prices to Be Paid to Local Producers for Their Products Is Reached by the Sherman Act if the Processed Product Is Intended to Cross State Lines.

The District Court's opinion which was adopted by the Circuit Court states that "products of a farm which are subsequently manufactured or processed into articles of commerce are beyond the reach of said (Sherman) Act." This is erroneous.

In *Schulte v. Gangi*, 328 U. S. 108, 120, the court said:

"We find nothing in the case that lends any support to the suggestion that a manufacturer's intrastate delivery to other manufacturers for further processing for ultimate interstate distribution interrupts production for interstate commerce."

Yet the latter is what the lower courts held.

In *Wickard v. Filburn*, 317 U. S. 111; *Curran v. Wallace*, 306 U. S. 1; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110; *American Tobacco Co. v. U. S.*, 328 U. S. 781; *Corn Products Refining Company v. Federal Trade Commission*, 324 U. S. 726, and *Swift & Co. v. U. S.*, 196 U. S. 375, the Supreme Court held that products of a farm that were subsequently manufactured or processed were within the reach of the commerce clause.

The Supreme Court in *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 465, said (emphasis added):

"With respect to the federal power to protect interstate commerce in the commodities produced, there is obviously no difference between coal mined or stone quarried and fruit and *vegetables grown*. The same principle must apply and has been applied to injurious restraints of interstate trade which are caused by the practices of *manufacturers and processors*."

In *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, the court said regarding processing of agricultural products, at p. 744. (emphasis added):

"The evils of the discrimination would seem to be the same whether the *processing* result in little or much alteration in the character of the commodity purchased and resold."

Likewise, the evils of price-fixing and price maintenance are the same whether much, little or no processing takes place.

In *Currin v. Wallace*, 306 U. S. 1, 10; *Mulford v. Smith*, 307 U. S. 38, 47; *U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533, 568, 569; *Lemke v. Farmers Grain Co.*, 258 U. S. 50, 54, and *Dahnke-Walker Milling Co. v. Bonderant*, 257 U. S. 282, 291, the Court held: "Where commodities are bought for use beyond state lines," the sale is a part of interstate commerce.

American Tobacco Co. v. U. S., 328 U. S. 781, involved the Big Three Tobacco companies (American Tobacco Company, Liggett & Myers Tobacco Company and R. J. Reynolds Tobacco Company). They sold from 70% to 80% of the country's cigarettes, a product manufactured from the tobacco purchased from the growers in "local" auctions. They were accused of conspiring to fix prices and to exclude undesirable competition against them in the purchase of domestic type of flue cured tobacco and burley tobacco, the raw materials essential to the production of cigarettes sold by them. The Supreme Court pointed out the following illegal restraints of trade directed against the grower:

- (1) The Big Three refused to purchase tobacco on a local market unless all three were present.
- (2) One would not participate in new local markets unless the other two were present.
- (3) Each placed limitations and restrictions on the prices their buyers were permitted to pay at local auctions and each put on the same ceiling.
- (4) Grades used in purchasing on local markets were formulated by the three, which resulted in the absence of competition.

The Big Three of the tobacco industry controlled from 70% to 80% of the cigarette market. The Big Three of the sugar beet industry controlled 100% of the sugar refining industry of Northern and Central California. The tobacco Big Three purchased leaf tobacco which had to be processed into cigarettes. None of the purchased leaf tobacco was sold as such by the Big Three. The sugar beet Big Three purchased sugar beets which had to be processed into sugar. None of the purchased sugar beets were sold as such by this Big Three.

The tobacco Big Three were convicted of violation of the Sherman Act by conspiring to control *local* prices paid to *local* farmers who produced their tobacco *locally* and who sold it *locally* to a purchaser who manufactured it into cigarettes which were sold in interstate commerce. The sugar beet Big Three likewise conspired to control prices paid to *local* farmers who produced their beets *locally* and sold them *locally* to purchasers who manufactured them into sugar sold in interstate commerce. The sugar beet Big Three are also guilty of violating the Sherman Act.

As the Supreme Court said in the tobacco case: "It is not the form of combination but the result to be achieved the statute condemns." The result in each case was the restraint of interstate commerce.

The tobacco case cannot be distinguished from the case at bar and the courts below erred in holding that the products of a farm, which are subsequently processed into articles of commerce, are beyond the reach of the Sherman Act.

The conspirators herein fixed and maintained the prices to be paid the growers. They refused to sell seed

or to take beets from any grower except on the prices and terms the conspirators had agreed upon in advance. The growers could get no seed from any other source and could sell their beets commercially to no one else, because the conspirators had a complete monopoly of sugar beet seeds and of sugar beet refining in Northern and Central California. [T. 72, 73.]

Price fixing and price maintenance combinations, reasonable or unreasonable, are illegal *per se* under the Sherman Act, whether local or wholesale prices are involved. (*U. S. v. Frankfort Distilleries*, 324 U. S. 293, 296; *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 212, 213; *U. S. v. Masonite Corp.*, 316 U. S. 265, 274; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.)

Nevertheless, the courts below held that the law was not violated, despite the price fixing and price maintenance monopoly, because the purchase of the beets was a "local" affair. This is directly contrary to the holding of the Supreme Court in *U. S. v. Frankfort Distilleries*, 324 U. S. 293, where the court, in discussing the fixing of local prices, said at page 297 (emphasis added):

"These two questions thus posed relate to the extent of the *Sherman Act's* application to trade restraints resulting from actions which take place within a state. In resolving them, there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the state. . . . The sole ultimate object of

respondent's combination in the instant case was price fixing or price maintenance. And with reference to commercial trade restraints such as these Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it 'exercised all the power it possessed.'

"The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices, does not of itself remove it from the scope of the Sherman Act; *retail outlets have ordinarily been the object of illegal price maintenance.*"

The Sherman Act has repeatedly been held by the Supreme Court to apply to the fixing of local or retail prices. (*U. S. v. Univis Lens Co.*, 312 U. S. 241, 253; *Ethyl Gasoline Corporation v. U. S.*, 309 U. S. 436; *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U. S. 373; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720, and *American Tobacco Co. v. U. S.*, 328 U. S. 781.)

The courts below ignored these cases and applied to the Sherman Act and long discarded mechanical tests of "manufacture," "production" and "local." They erred in so doing.

The conspirators herein had a monopoly of the supply of sugar beet seeds in the area here involved and owned and controlled all the sugar beet refineries. [T. 72, 73.] No farmer could buy sugar beet seeds or dispose of his sugar beets except from or to one of the conspirators upon the terms and conditions and at the price agreed upon in advance by these conspirators. [T. 73.] Whether

the conspiracy be considered as "aimed at restraining or destroying competition, or had as its purpose a restraint of the free availability of 'sugar beet seeds and sugar beet refining' services in the market, the Apex Hosiery Co. case places it within the scope of the statute." (*American Medical Asso. v. U. S.*, 317, 519, 529:) "The fact that the ultimate object of the conspiracy charged was the fixing or maintenance of local retail prices" (paid farmers) "does not of itself remove it from the scope of the Sherman Act." (*U. S. v. Frankfort Distilleries*, 324 U. S. 293, 297.)

E. Plaintiffs' Cause of Action Does Not Depend on Plaintiffs Being Engaged in Interstate Commerce, Because the Price-fixing Acts Complained of Were a Part of the Conspirators' Interstate Commerce.

American Tobacco Co. v. U. S., 328 U. S. 781;

U. S. v. Bausch & Lomb Optical Co., 321 U. S. 707, 720;

U. S. v. Frankfort Distilleries, 324 U. S. 293;

Currin v. Wallace, 306 U. S. 1;

U. S. v. Wrightwood Dairy Co., 315 U. S. 110, 120.

"The Sherman Act denounced every conspiracy in restraint of trade, including those carried on by acts constituting intrastate commerce." *Local 167 v. U. S.* 291 U. S. 293, 297.

"Competitive practices which are wholly intrastate may be reached by the Sherman Act because of their injurious effect on interstate commerce." *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110, 120.

"Where goods are purchased in one state for transportation to another, the commerce includes the purchase quite as much as it does the transportation."

Curriu v. Wallace, 306 U. S. 1, 10;

U. S. v. Rock Royal Coop., Inc., 307 U. S. 533, 568, 569;

Lemke v. Farmers Grain Co., 258 U. S. 50, 54;

Dahnke-Walker Milling Co. v. Bonderant, 275 U. S. 282, 291.

Congressional power over interstate commerce reaches back to the steps prior to transportation in interstate commerce. *U. S. v. Darby*, 312 U. S. 100, 117.

"Congressional authority to protect interstate commerce is not limited to transactions which can be termed an essential part of a flow of interstate or foreign commerce." *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148, 154.

Activities intrastate in character, when separately considered, come under the Commerce Clause if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions.

(*N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 36, 37; *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 465, 466; *U. S. v. Darby*, 312 U. S. 100, 122; *Wickard v. Filburn*, 317 U. S. 111; *Ramsay v. Associated Billposters*, 260 U. S. 501.)

Most interstate commerce takes place within the confines of the states and necessarily involves incidents occurring within each state through which it passes or with which it is connected in fact. Such incidents cannot be

segregated by an act of mental gymnastics by labeling them as "separate and distinct" or "local." *Nippert v. Richmond*, 327 U. S. 416.

In *Ramsay v. Associated Billposters of U. S.*, 260 U. S. 501 (Jan. 2, 1923), the court stated at p. 511:

"The court below held: 'The business of the solicitors is to send their customers advertisements to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that after the posters have arrived at destination, the posting of them by the billposters is a purely local service, not directly affecting, but merely incidental to, interstate commerce. We think this follows from the decision of the Supreme Court in *Hopkins v. United States*, 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40.'

"We cannot accept this view. The alleged combination is nation-wide; members of the Association are bound by agreement to pursue a certain course of business, designed and probably adequate materially to interfere with the free flow of commerce among the states and with Canada. As a direct result of the defendants' joint acts, plaintiff's interstate and foreign business has been greatly limited or destroyed. *Hopkins v. United States* is not applicable. There the holding was that the rules, regulations, and practices of the association directly affected local business only. The purpose of the combination here challenged is to destroy competition and secure a monopoly by limiting and restricting commerce in posters to channels dictated by the confederates, to exclude from such trade the undesired, including the plaintiffs, and to enrich the members by demanding

noncompetitive prices. The allegations clearly show the result has been as designed,—that the statute has been violated and plaintiff's business has suffered."

The Court, after citing numerous cases, stated at p. 512:

"The fundamental purpose of the Sherman Act was to secure equality of opportunity and to protect the public against evils commonly incident to destruction of competition through monopolies and combinations in restraint of trade. The alleged actions of defendants are directly opposed to this beneficent purpose and are denounced by the statute.

"We find no adequate support for the claim that plaintiffs were parties to the combination of which they now complain."

"Reversed."

The reasoning of the lower courts herein is the same as the reasoning of the lower court in the *Ramsay* case. Both erred.

F. If Respondent Refiner Had Itself Grown the Beets Besides Refining Them and Selling the Sugar, Each Step Would Have Been Part of the Stream of Interstate Commerce. This Stream Was Not Broken Because an Independent Contractor Performed Some of the Steps.

In *Martino v. Michigan Window Cleaning Co.*, 327 U. S. 173, the Court said:

"If the services rendered in this case had been rendered by employees of respondent's customers engaged in the production of goods for interstate commerce, those employees would have come under the Act." (The Fair Labor Standards Act of 1938.)
"Respondent's employees are not to be excluded from

such coverage merely because their employment to do the same work was under independent contracts. *A. B. Kirschbaum Co. v. Walling*, 316 U. S. 517; *Warren-Bradshaw Drilling Co. v. Hall*, 317 U. S. 88, 90."

See also:

Walling v. Amidon (C. C. A. 10th), 153 F. (2d) 159, 161.

Roland Electric Co. v. Walling, 326 U. S. 657, involved a Maryland corporation doing business only in Maryland in wiring and installing motors for industrial uses engaged in interstate commerce. The Supreme Court pointed out that if Roland Electric had not done the work, the industrial users would have had to do it themselves, and therefore Roland Electric was engaged in "the production of goods for commerce."

So, here, if plaintiffs had not planted the seed (bought from respondent), raised the beets, and delivered them to respondent to be processed into sugar to be sold in interstate commerce, respondents would have had to do those acts themselves. Therefore, plaintiffs were engaged "in production of goods for commerce," and the Sherman Act applied.

5. The Courts Below Erroneously Held That Appellants, Although Damaged by the Price-Fixing Conspiracy Could Not Recover Because Some Other Farmers Were Not Damaged to the Same Extent.

The District Court in its Opinion stated:

"From the complaint it appears that the net result of the conspiracy was that all growers in said area received the same price for their sugar beets and while the plaintiffs may have suffered a detriment, growers delivering their beets to other sugar refineries received an advantage."

There is no basis in the record for this statement.

It is true that the result of the conspiracy was that all growers in the district received the same price for the same product, *regardless of with which refinery they dealt*. That alone rendered the combination illegal. But that does not mean that certain growers received more than they would otherwise have received. All growers, as a result of the conspiracy, lost the advantages of competition because the refineries "no longer competed with any of the other manufacturers . . . as to efficiency of sales or manufacturing organizations" [Comp. Par. IX-c, T. 76-77]. "Defendant as a result of said conspiracy did not during said crop season of 1939, 1940 or 1941 conduct its interstate operations in as efficient and careful manner as it had prior thereto (when there was no conspiracy but there was competition between itself and the other manufacturers) or in as efficient or careful a manner as it

would have, had said conspiracy not existed." [Comp., Par. XI, T. 78-79.]

This meant that all growers were damaged by the conspiracy but that plaintiffs and the other growers who dealt with the most efficient of the three conspirators were damaged more than the rest, because they lost not only the advantage of competition but also the advantage of dealing with the most efficient of the three conspirators.

But even if some growers who dealt with one of the other conspirators received more for their sugar as a result of the price-fixing conspiracy than they otherwise would have received, the injury done plaintiffs and the other farmers who dealt with defendant is not excused. If it were, then price-fixing conspirators could with immunity injure or even wipe out one group after another as long as all groups were not affected at once.

Price-fixing agreements are illegal *per se*, and "it is no excuse for monopolizing a market that the monopoly has not been used to extract from the consumer more than a fair profit." (*U. S. v. Aluminum Co. of America*, 148 F. (2d) 416.)

In *American Tobacco Co. v. U. S.*, 328 U. S. 781, the Court stated:

"The authorities support the view that the material consideration in determining whether a monopoly exists is not that prices are raised or that competition actually is excluded but that power exists to raise prices or to exclude competition when it is desired to do so."

Frequently conspirators have claimed that their conspiracy to restrain prices was justified because of the

economic good the conspiracy achieved but just as frequently the Supreme Court has ruled that price-fixing agreements are illegal *per se* and that good motives or economic results are immaterial. (*U. S. v. Socony Vacuum Oil Co.*, 310 U. S. 150, 212, 213.) Price-fixing, reasonable or unreasonable, is unlawful *per se*." (*U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720.)

6. **Trade Includes Both Buying and Selling. It Is No Excuse for Monopoly That Prices Are Not Raised to the Ultimate Consumer. The Sherman Act Protects Buyers and Sellers, Consumers and Producers, Not Merely Consumers and Buyers as Respondent Contends.**

In *Sugar Institute of America v. U. S.*, 297 U. S. 553, the importance of the sugar beet industry in this country was stressed. The Court stated at page 572:

"Beet sugar for many years has been an important factor in the domestic market. It is produced and sold chiefly in the middle and far West, providing in some States over 65 per cent. of the supply, and it competes with other sugars in the number of Southern and Middle Atlantic States."

At page 573 the Court stated:

"In sales by refiners to manufacturers of products containing sugar—about one-third of the sugar consumed—price, not brand, was always the vital consideration."

The various sugar refineries involved in that case had combined to eliminate and suppress price competition between themselves as to the price at which they would sell refined sugar, and to maintain relatively high prices for

refined sugar as compared to the prices for raw sugar and to limit and suppress numerous contract terms and conditions involved in the sale of refined sugar. By the 1930 decree of the Supreme Court they were enjoined from proceeding further with this conspiracy.

The refineries involved in the 1930 case were foiled by that decree in their endeavor to gouge *the consumer* of sugar and thus illegally enrich themselves. Nevertheless, all the beet sugar refineries of Northern and Central California in 1937 or 1938 organized the conspiracy herein involved to suppress competition at the *beginning* rather than at the *end* of the interstate journey by fixing the price to be paid the *producer* of the sugar beets and by monopolizing the industry as to him in the area here involved.

Faced with the decree in the *Sugar Institute* case, the respondent herein has raised the defense that the Sherman Act only protects buyers or consumers and not sellers or producers.

But the Supreme Court in the *Sugar Institute* case stated at page 600:

"We have said that the Sherman Act, as a charter of freedom, has a generality and adaptability comparable to that found to be desirable in constitutional provisions. It does not go into detailed definitions. Thus in applying its broad prohibitions, each case demands a close scrutiny of its own facts. Questions of reasonableness are necessarily questions of relation and degree. In the instant case, a fact of outstanding importance is the relative position of defendants in the sugar industry. We have noted that the fifteen refiners, represented in the Institute, refine practically all the imported raw sugar processed in

this country. They supply from 70 to 80 per cent. of the sugar consumed Another outstanding fact is that defendants' product is a thoroughly standardized commodity. In their competition, price, rather than brand, is generally the vital consideration. The question of unreasonable restraint of competition thus relates in the main to competition in prices, terms and conditions of sales. The fact that, because sugar is a standardized commodity, there is a strong tendency to uniformity of price, makes it the more important that such opportunities as may exist for fair competition should not be impaired."

There the conspirators controlled from 70 to 80% of the raw sugar processed in this country.

Here the conspirators controlled 100% of the sugar beet seed supply and 100% of the sugar beet refineries in Northern and Central California. The sugar that they produced is the same "thoroughly standardized commodity" as was involved in the *Sugar Institute* case. "Price, rather than brand" is still the same "vital consideration." Prior to 1939 there was competition among the refineries in prices, terms and conditions of sale with producers but as a result of the conspiracy herein such competition ceased and the conspirators, through their 100% monopoly, fixed and maintained prices, terms and conditions of sale. [Comp. par. X, T. 77-78.]

Respondents contend that the Sherman Act protects buyers or consumers and not sellers or producers. That position is not well founded. The Sherman Act "as a charter of freedom has a generality and adaptability comparable to that found to be desirable in constitutional provisions." (*Sugar Institute of America v. U. S.*, 297 U. S. 553.) It is not a "charter of freedom" merely for

buyers or consumers; it is a "charter of freedom" for everyone. It protects not only the housewife who buys the manufactured sugar, but also the farmer who produces the sugar beets. It protects not only John Doe Citizen who buys a cigarette, but also Richard Roe Farmer who produces the tobacco from which the cigarette was made. (*American Tobacco Co. v. U. S.*, 328 U. S. 781.) It protects not only the housewife who buys ham, bacon, beef or mutton at the butcher shop to serve on her family table, but also the cattle raiser who raises the cattle from which the meat was processed. (*Swift & Co. v. U. S.*, 196 U. S. 375; *U. S. v. Swift & Co.*, 286 U. S. 105.) It protects not only the child who pays his nickel or dime for an ice cream cone but also the farmer whose cow gave the cream that was processed into that ice cream. (*U. S. v. Borden*, 308 U. S. 188; *U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110) It protects everyone.

In *Montrose Lumber Co. v. U. S.* (C. C. A. 10th, 1941), 24 F. (2d) 573, the Court said:

"It is true that in most cases of monopoly of trade, sellers and not buyers, are the actors. However, Sec. 2 of the Sherman Act embraces monopolies of trade and commerce among the several states by whomsoever effected." (577) ". . . Trade necessarily involves both buying and selling and the control of either monopolizes trade." (p. 578.)

In *White Bear Theatre Corp. v. State Theatre Corp.* (C. C. A. 8, 1942), 129 F. (2d) 600, the court said (p. 604):

"The competitive freedom of such markets in both buying and selling, is one of the principal things which the Sherman Act was intended to protect."

American Tobacco Co. v. U. S., 328 U. S. 781, involved a conspiracy to monopolize the market of the unprocessed farm product (leaf tobacco) and also to monopolize the market in the processed product (the cigarette).

"The conspiracy" in the *Tobacco* case was one "to fix and control prices and other material conditions relating to the purchase of raw material in the form of leaf tobacco for use in the manufacture of cigarettes. It also appears to have been one to fix and control prices and other material conditions relating to the distribution and sale of the product of such tobacco in the form of cigarettes. The jury found a conspiracy to monopolize to a substantial degree the leaf market and the cigarette market. . . . The verdicts show that the jury found that

the petitioners conspired to fix prices and to exclude undesired competition against them in the purchase of the domestic type of flue-cured tobacco and of burley tobacco. . . . These are raw materials essential to the production of cigarettes of the grade sold by the petitioners" (P. 798.)

This is the very type of conspiracy of which respondent herein has been guilty. A conspiracy to fix prices and exclude competition in the purchase at local sales from the farmers of the raw materials essential to the production of cigarettes is a violation of the Sherman Act. So, therefore, is a conspiracy to fix prices and exclude competition in the purchase of the raw material essential to the production of sugar.

Local 167 v. U. S., 291 U. S. 293, involved a conspiracy to monopolize and restrain interstate commerce in live and freshly drawn poultry, in violation of paragraphs 1 and 2 of the Sherman Act. In that case, as at the case at bar,

defendants contended that there was no proof that they intended to restrain or did interfere with interstate commerce. The court held at p. 297 that there was no merit in such contention and said:

"We need not decide when interstate commerce and that which is intra-state begins. The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly to restrain and monopolize interstate commerce."

The court further stated at p. 297:

"The Sherman Act denounces every conspiracy in restraint of trade including those that are to be carried on by acts constituting intrastate transactions."

At pp. 299 and 300:

"And, maintaining that interstate commerce ended with the sales by receivers to marketmen, appellants insist that the injunction should only prevent acts that restrain commerce up to that point. But intrastate acts will be enjoined whenever necessary or appropriate for the protection of interstate commerce against any restraint denounced by the Act."

The decision in *U. S. v. Aluminum Co. of America*, 148 F. (2d) 416, which has, in effect, been adopted by the Supreme Court as its own decision, stated:

"It is no excuse for 'monopolizing' a market that the monopoly has not been used to extract from the consumer more than a 'fair' profit."

At page 445, the court stated:

"There remains only the question whether this assumed restriction had any influence upon prices . . . To that *Socony-Vacuum Oil Co. v. United States*, 310 U. S. 150, 84 L. Ed. 1129, is an entire answer. It will be remembered that, when the defendants in that case protested that the prosecution had not proved that the 'distress' gasoline had affected prices, the court answered that that was not necessary, because an agreement to withdraw any substantial part of the supply from a market would, if carried out, have some effect upon prices, and was as unlawful as an agreement expressly to fix prices. The underlying doctrine was that all factors which contribute to determine prices, must be kept free to operate unhampered by agreements."

This decision in the *Aluminum* case is referred to by the Supreme Court in *American Tobacco Co. v. U. S.* (June 10, 1946), 328 U. S. 781, as a case decided "under unique circumstances which add to its weight as a precedent."

Paraphrasing the Circuit Court of Appeals for the Sixth Circuit, in *Fitch v. Kentucky-Tennessee Light and Power Co.*, 136 F. (2d) 12, we can say:

"Obviously the price of the" (sugar beets) "directly affected the prices charged the consumers for" (raw sugar) "in various states."

In that case the coal produced by an intrastate operator and sold by him by local sales to be used to manufacture

power, was held to be as much an element of the power as though it were a constituent part thereof—yet here the sugar in the beet, which was a constituent element of the processed sugar, was held not to be included within the interstate commerce of which the sugar was a part. In *Walling v. Amidon*, (C. C. A. 10th), 153 F. (2d) 159, the intrastate producer of sand used to line troughs which carried molten metal to the furnaces of an interstate steel producer, was held to be the producer of goods for commerce. Yet here the production of sugar beets from which the interstate commodity sugar was extracted was held to be a local product, not reached by the Commerce Clause.

U. S. v. Rock Royal Coop., Inc., 307 U. S. 533, involved the prices to be paid to a dairy farmer who delivered his milk to a plant within the state of production of the milk. This "local transaction" was held to be part of interstate commerce.

In *U. S. v. Borden*, 308 U. S. 188 the first count charged a conspiracy to fix, maintain and control prices to be paid *producers* for milk, and the second count charged a conspiracy to fix and maintain prices to *consumers* for the sale of the milk. The Supreme Court held that *both* counts stated a cause of action. If it is a violation of the Sherman Act to conspire to fix, maintain and control prices to be paid for raw milk, it is also a violation of the Sherman Act to conspire to fix, maintain and control prices to be paid *producers* for sugar beets.

In *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 222, the Court said (emphasis added):

"An agreement to *pay* or charge rigid, uniform prices would be an illegal agreement under the Sherman Act. But so would agreements to raise or lower prices whatever machinery for price-fixing was used. . . . Hence, prices are fixed within the meaning of the Trenton Potteries Co. Case if the range within which *purchases* or sales will be made is agreed upon, if the prices *paid* or charged are to be at a certain level or on ascending or descending scales, if they are to be uniform, or if by various formulae they are related to the market prices. They are fixed because they are agreed upon." (Emphasis added.)

"Any combination which tampers with price structures is engaged in an unlawful activity. . . . The Act places *all* such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive." (Emphasis added.) *Idem.*, p. 221.

"Proof that a combination was formed for the purpose of fixing prices and that it caused them to be fixed or contributed to that result is proof of the completion of a price-fixing conspiracy under Sec. 1 of the Act." *Idem.*, p. 223.

In *U. S. v. American Tobacco Co.*, 221 U. S. 106, defendants were charged with conspiring together in con-

nection with the "*purchasing* of leaf tobacco" and in connection with "selling and distributing its manufactured output" and with forming an agreement or combination "intended to destroy competition. . . . in reference to such *purchases* or sales." (Emphasis added.)

In *Swift & Co. v. U. S.*, 375, the defendants had agreed not to bid against each other in the livestock market of different states, to bid up prices for a few days in order to induce the cattle men to send their stock to the stock-yards, and to fix the prices at which they would sell. The Supreme Court sustained a conviction on both elements of the conspiracy—buying and selling.

In *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, it was contended, as respondent contends here, that "local" buying was not part of interstate commerce; but the Supreme Court there stated, at p. 291 (emphasis added):

"On the same principle, where goods are purchased in one state for transportation to another, the commerce includes the *purchase* quite as much as it does the transportation. . . . 'Buying and selling and

the transportation incidental thereto constitute commerce' . . . 'contracts to buy, sell, or exchange goods to be transported among the several states' were declared 'part of interstate trade or commerce.'

. . . *In no case has the court made any distinction between buying and selling, or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling, it was not material whether it came first or last."*

Respondent admits that if price-fixing was of the price *at destination*, there would be a violation of the Sherman Act, but argue that fixing of prices *at point or origin* does not violate the Act. (Brief in Opposition to Petition for Writ of Certiorari, p. 15.) Such, however, is not the law, because it is not material whether the physical transportation across the State line came first or last.

In *U. S. A. v. American Livestock Commission Co.*, 279 U. S. 435, it was held that interstate commerce included buying as well as selling. The Supreme Court there upheld an order by the Secretary of Agriculture requiring the defendants to discontinue a boycott by which they refused to buy livestock from a cooperative association.

In *Standard Oil Co. v. U. S.*, 283 U. S. 163, the Court stated at p. 169 (emphasis added):

"Moreover, while manufacture is not interstate commerce, agreements concerning it tend to limit the supply or to fix the price of goods *entering* into interstate commerce, or which have been executed for that purpose, are within the prohibitions of the Act. . . . And pooling arrangements may obviously result in restricting competition."

The Sherman Act is a "Charter of Freedom" for all. (*Sugar Institute v. U. S.*, 297 U. S. 553, 600), and it is not to be restricted, as respondents contend, to buyers or consumers. Sellers and producers are also protected by it.

7. The District Court Relied Upon the 1886 Decision of *Coe v. Errol* (a Tax Case) and Upon Cases Following *Coe v. Errol*, in Holding That Production and Manufacture of Goods Is Not Commerce. *Coe v. Errol* Is No Longer Any Authority on Cases Arising Under the Sherman Act. The Circuit Court of Appeals Stated: "We Do Not Approve the Citation of Tax Cases as Authority for Any Issue in This Case." But the Remaining Cases Cited by the District Court (and Approved by the Circuit Court of Appeals) Are, With One Exception, Cases That Rely Upon the Tax Case of *Coe v. Errol*. The Exception Is *Parker v. Brown*, Which Supports Appellants' and Not Respondent's Position. As a Result, the Decision of the Circuit Court of Appeals Has No Foundation of Authority Whatsoever.

The Opinion of the Circuit Court stated:

"We have carefully examined the opinion (of the District Judge) and approve it except in the instances hereinafter set forth. We do not approve the citation of tax cases as authority for any issue in the case, although their citation presents no inconsistency in the opinion."

The opinion of the District Court cited *Coe v. Errol*, 116 U. S. 517; *Crescent Cotton Oil Co. v. State of Mississippi*, 257 U. S. 129; *Dothan Oil Mill Co. v. Espy*, 220 Ala. 605, 127 So. 178; *Utah-Idaho Sugar Co. v. Federal Trade Commission*, 22 F. (2d) 122, 125, and *Parker v. Brown*, 317 U. S. 341, 361.

Coe v. Errol, the case primarily relied upon by the District Court, is a tax case and therefore was not approved by the Circuit Court of Appeals. It was decided

in 1886 and sets forth the law as to the power of a State to tax personal property that has not passed across the State line. Subsequent Supreme Court decisions have limited the effect of this case to situations involving local taxation or regulation and have held that the statements made therein do not apply to cases under the Sherman Act or the National Labor Relations Board Act (*Stafford v. Wallace*, 258 U. S. 495, 525; *Santa Cruz Fruit Packing Co. v. N. L. R. B.*, 303 U. S. 453, 466. *Coe v. Errol* was cited by the majority in *Carter v. Carter Coal Co.*, 298 U. S. 238, with Justices Cardozo, Brandeis and Stone dissenting, but the Supreme Court subsequently held that *Carter v. Carter Coal Co.* does not state the law in so far as the Sherman Act and the N. L. R. B. Act are concerned. *N. L. R. B. v. Jones & Laughlin Steel Corp.*, 301 U. S. 1; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381; *U. S. v. Darby*, 312 U. S. 100, 122. See discussion in *Hamlet Ice Co. v. Fleming* (C. C. A. 4th), 127 F. (2d) 165, 169.)

The Circuit Court of Appeals specifically stated: "We do not approve the citation of tax cases as authority for any issue in the case" and yet, out of five cases cited by the District Court on interstate commerce, one of them was a tax case, three of them relied upon that tax case and only one, *Parker v. Brown*, 317 U. S. 341, did not. *Parker v. Brown*, however, is of no benefit whatsoever to respondent. It involved the California Raisin Prorate Program. The Supreme Court, in deciding the case, assumed "for present purposes that the California Prorate Program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons,

... (p. 350), *Parker v. Brown* cited the *Crescent Cotton Oil Co.* case, at p. 360, as an example of the cases holding "that for purposes of local taxation or regulation, manufacture is not interstate commerce even though the manufacturing process is of slight extent."

"But courts are not confined to so mechanical a test" (p. 362); and limited such cases to situations involving local taxation or regulation in matters involving the safety, health and well-being of local communities. Yet the courts below erroneously applied cases involving local taxation and regulation to the Sherman Act.

The opinion of the Circuit Courts of Appeals, therefore, stands in the paradoxical position of holding that tax cases are not "authority for issues in this case" and at the same time relying entirely upon cases which in turn rely upon those very tax cases!

Crescent Cotton Oil Co. v. State of Mississippi was a 1921 decision which relied primarily on *Coe v. Errol* and laid down the rule "that manufacture is not commerce and the fact that an article is intended for export to another state does not render it an article of interstate commerce."

This 1921 rule is not the law today and it has been specifically repudiated by the U. S. Supreme Court in *United States v. Southeastern Underwriters Assn.*, 322 U. S. 533, 546; *Wickard v. Filburn*, 317 U. S. 111; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110; *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726; *U. S. v. Darby*, 312 U. S. 100; *U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533; *Curran v. Wallace*, 306 U. S. 1, 12; *Mulford v. Smith*, 307 U. S. 38, 47, etc. *Wickard v. Filburn*, held that the "mechanical application of legal

formulas" (such as set forth in the cases cited by the District Judge) is "no longer feasible" (p. 124), and that the "few dicta and decisions of this Court which might be understood to lay it down that activities such as 'production,' 'manufacturing' and 'mining' are strictly local and . . . cannot be regulated under the commerce power . . . are not the law today." But the Circuit Court, by adopting the decision of the District Court has held that such dicta and decisions are the law today in the Ninth Circuit!

Wickard v. Filburn also said: "Whether the subject of the regulation in question was 'production,' 'consumption' or 'marketing' is, therefore, not material for purposes of deciding the question of Federal power." *The very question that the Supreme Court held "not material for purposes of deciding the question of Federal power" was the very one used by the courts below for deciding the question.*

Dothan Oil Mill Co. v. Espy, 220 Ala. 605, 127 So. 178, cited by the District Court, is another of the earlier cases applying the *Coe v. Errol* doctrine of the tax cases. In that case certain cotton ginner's were charged in the state court in 1938 with conspiracy to restrain trade. The defendants seeking to avoid liability claimed that the matter came within the exclusive jurisdiction of the Federal Trade Commission. The Alabama Court upheld the state's jurisdiction. If that case is authority for the proposition that the Federal courts did not have jurisdiction over the facts therein set forth, then it is contrary to *Wickard v. Filburn*, 317 U. S. 111; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 100; *Currin v. Wallace*, 306 U. S. 1; *American Tobacco Co. v. U. S.*, 328 U. S. 781, and numerous other cases we have cited.

The District Court cited *Utah-Idaho Sugar Co. v. Federal Trade Commission*, 22 F. (2d) 122. This was decided in 1927 and applied the now discarded dogma "that production and manufacture is not commerce" and held that "only such acts as directly interfere with commerce come under Federal jurisdiction." The first case cited in the *Utah-Idaho Sugar Co.* case was the tax case of *Coe. v. Errol*, which, as we have shown, is not applicable to Sherman Act cases. The *Utah-Idaho Sugar Co.* case is not the law today. In *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726, the Supreme Court specifically held that the intrastate sale of dextrose used to manufacture candy was subject to the Federal Trade Commission Act where the dextrose was used to manufacture candy sold in interstate commerce. This case and *U. S. v. Darby*, 312 U. S. 100, have in effect overruled the doctrine of the *Utah-Idaho Sugar Co.* case.

Winslow v. Federal Trade Commission (C. C. A. 4th), 277 Fed. 206, was another Circuit Court of Appeals case which had followed the tax cases and reached the same result as did the Court in the *Utah-Idaho Sugar Co.* case and the Courts below. But in a later decision of the Fourth Circuit (*Hamlet Ice Co. v. Fleming*, 127 F. (2d) 165), the Court pointed out at page 169 that *U. S. v. Darby*, 312 U. S. 100, had changed the law as expressed in the *Winslow* case by extending the application of the Commerce Clause to intrastate activities which affected interstate commerce.

Respondents in their Brief in Opposition to Petition for Writ of Certiorari contend that "production and manufacture of goods or commodities is not commerce within the Sherman Act," citing *United Mine Workers*

of *America v. Coronado Coal Co.*, 259 U. S. 344, *United Leather Workers International Union v. Herkett and Meisel Trunk Co.*, 265 U. S. 457, *Industrial Association v. U. S.*, 268 U. S. 64, and *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295, the most recent of which was decided in 1925.

The Supreme Court since 1925 has repeatedly repudiated this rule. *U. S. v. Frankfort Distilleries*, 324 U. S. 293, 297; *Wickard v. Filburn*, 317 U. S. 111, 120-125; *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110, 118-121; *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726; *U. S. v. Darby*, 312 U. S. 100, 118-123; *U. S. v. Rock Royal Coop., Inc.*, 307 U. S. 533, 568-569; *Curran v. Wallace*, 306 U. S. 1, 10-13; *Mulford v. Smith*, 307 U. S. 38, 48; *Parker v. Brown*, 317 U. S. 341, 362; *U. S. v. Southeastern Underwriters Assn.*, 322 U. S. 533.

The cases cited by respondent herein were likewise cited by the respondents in *U. S. v. Frankfort Distilleries, Inc.*, 324 U. S. 293, a Sherman Act case. There the Supreme Court stated:

"It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce. The cases relied upon by respondents fall within this category. All of them involved the application of the Anti-Trust laws to combinations of businessmen or workers in labor disputes, and not to interstate commercial transactions. On the other

hand, the sole ultimate object of respondent's combination in the instant case was price fixing or price maintenance. And with reference to commercial trade restraints such as these, Congress, in passing the Sherman Act, left no area of its constitutional power unoccupied; it exercised all the power it possessed."

Inasmuch as cases referred to by the Supreme Court in the *Frankfort Distilleries, Inc.* case (note 2 of the Opinion) are the same cases that are relied upon by respondents herein, it is evident that the *Frankfort Distilleries, Inc.* case is a complete answer to respondents' contention.

The attorneys for respondents in *C. E. Stevens v. Foster & Kleiser Co.*, 311 U. S. 252, likewise cited in their brief three of the four Supreme Court decisions cited at p. 8 of Respondents' Brief in Opposition to Writ of Certiorari, as authority that "production and manufacture of goods or commodities is not commerce" but the Supreme Court reversed the Circuit Court of Appeals which had sustained the actions of the District Court in dismissing the amended complaint.

The mechanical tests relied upon in cases involving local taxation and regulation are not applicable in Sherman Act cases and the lower court erred in applying them.

Respondent insists that interstate commerce is not involved in the purchase of sugar beets by the refinery for processing into sugar to be sold in interstate commerce under a contract where the price paid for the sugar beets is determined by the price received by the refinery for the processed sugar. A like contention was made in

Currin v. Wallace, 306 U. S. 1, involving the Tobacco Inspection Act, where Federal inspection was upheld of the unprocessed tobacco before it was even sold in local markets. There the Supreme Court stated at p. 10:—

"Where goods are purchased in one state for transportation to another, the commerce includes the purchase as much as it does the transportation There is no permissible constitutional theory which would apply this principle to purchases of livestock as in the *Swift* and *Stafford* cases and of grain as in the *Lemke* and *Shafer* cases; and deny its application to tobacco."

Likewise, there is no permissible constitutional theory which would deny its application to sugar or sugar beets. Even the local marketing of a farm product that never crosses state lines in original or processed form comes under the commerce clause if it might affect the interstate marketing of like products. (*U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110, 120; *Wickard v. Filburn*, 317 U. S. 111.) So sugar beets which cross state lines in processed form come under the Commerce clause.

8. Public Interest Is Involved.

Respondents erroneously contend that no public interest is involved. The Supreme Court stated in *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30 at 44:

"The interest of the public in the preservation of competition is of primary consideration."

The American public certainly is interested in preserving competition among the buyers of sugar beets just as much as it is interested in preserving competition in News Service, (*Associated Press v. U. S.*, 326 U. S.

1), Multifocal Lenses (*U. S. v. Univis Lens*, 316 U. S. 241), Electrical Equipment, (*Allen Bradley Co. v. Local Union No. 3*, 325 U. S. 797), Electrical Transformers, (*Sola Electric Co. v. Jefferson Elec. Co.*, 317 U. S. 173), Photographic Materials, (*Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359), Group Health Service, (*American Medical Asso. v. U. S.*, 317 U. S. 519), Hardboard, (*U. S. v. Masonite Corp.*, 316 U. S. 265), Sign-Boards, (*C. E. Stevens Co. v. Foster & Kleiser*, 311 U. S. 255), (*Ramsay v. Associated Bill-posters*, 260 U. S. 501), Milk, (*U. S. v. Borden*, 308 U. S. 188), Gasoline & Oil, (*Standard Oil Co. v. U. S.*, 283 U. S. 163, *Ethyl Gasoline Corp. v. U. S. A.*, 309 U. S. 436; *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150), Motion Pictures, (*Interstate Circuit v. U. S. A.*, 306 U. S. 208; *U. S. v. Crescent Amusement Co.*, 323 U. S. 173; *Paramount Famous Lasky Corp. v. U. S.*, 282 U. S. 30), Livestock, (*Swift & Co. v. U. S.*, 196 U. S. 375), *U. S. v. Swift & Co.*, 286 U. S. 105), Tobacco, (*U. S. A. v. American Tobacco Co.*, 221 U. S. 106; *American Tobacco v. U. S.*, 328 U. S. 781), Tabulating Cards for Business Machines, (*International Business Machines Corp. v. U. S.*, 298 U. S. 131), Poultry, (*Local 167 v. U. S.*, 291 U. S. 293), Paper, (*Story Parchment Co. v. Patterson Paper Co.*, 282 U. S. 555), Glassware Machinery, (*Hartford Empire Co. v. U. S. A.*, 323 U. S. 36), Retail Liquor, (*U. S. v. Frankfort Distilleries, Inc.*, 324 U. S. 293), Tiles, (*W. W. Montague Co. v. Lowry*, 193 U. S. 38), Enameled Ironware, (*Standard Sanitary Mfg. Co. v. U. S.*, 226 U. S. 20), Lumber, (*Eastern States Retail Lumber Dealers Asso. v. U. S.*, 234 U. S. 600, (*American Column & Lumber Co. v. U. S.*, 257 U. S. 377), Cast Iron Pipe, (*Addyston Pipe and Steel*

Co. v. U. S., 175 U. S. 211, (*Chattanooga Foundry v. Atlanta*, 203 U. S. 390), *Linseed Oil*, (*U. S. v. American Linseed Oil Co.*, 262 U. S. 371), and *Farm Paper Advertising*, (*Indiana Farmers Guide Publishing Co. v. Prairie Farmer Pub. Co.*, 293 U. S. 268).

"As we have pointed out, price fixing or maintenance agreements are invalid *per se* under the Sherman Act. (*U. S. v. Frankfort Distilleries*, 324 U. S. 393, 396; *U. S. v. Socony-Vacuum Oil Co.*, 310 U. S. 150, 212, 213; *U. S. v. Masonite Corp.*, 316 U. S. 265, 274; *U. S. v. Bausch & Lomb Optical Co.*, 321 U. S. 707, 720), which is merely another way of stating that public interest is conclusively presumed to exist and need not be otherwise shown in cases involving price fixing or maintenance agreements. (This is pointed out in *Lynch v. Magnavox Co.* (C. C. A. 9th) 94 Fed. 2d 883, 891, one of the cases cited by respondents).

If we paraphrase a portion of the Opinion in *Georgia v. Pennsylvania Ry. Co.*, 324 U. S. 349, 450, we have the following:

"If the allegations of the Bill are taken as true, the economy of California and the welfare of her citizens have seriously suffered as a result of this alleged conspiracy. An agreement between all of the sugar refineries in Northern and Central California fixing prices to be paid sugar beet growers and agreeing to sell sugar beet seeds to, and refined sugar beets produced by only those farmers who will sign the uniform contract agreed to by the conspirators is but one form of trade barrier. It may cause a blight no less serious than the spread of noxious gas over the land, or the deposit of sewage in the streams. It may affect the prosperity and

welfare of the State as any diversion of water from the rivers. It may stifle, impede or cripple the sugar beet raising industry and industries dependent thereon, and may prevent the establishment of new ones. It may arrest the development of the State or put it at a decided disadvantage in competitive markets."

If all the canneries in California entered into an agreement whereby they fixed the price to be paid fruit growers and agreed upon a standard, uniform contract and refused to buy fruit from any fruit grower, except under the conditions specified in the agreed uniform contract, surely the public interest would be involved.

If all the cattle buyers buying in Texas agreed to buy cattle only at a fixed price and upon an agreed contract and refused to buy cattle from any cattle raiser who would not sign the agreed uniform contract, certainly the public interests would be involved.

If all the cotton buyers buying in Alabama entered into an agreement whereby they fixed the price to be paid the grower and would not deal with any grower who would not sign the uniform contract, certainly public interest would be involved.

Throughout the war, sugar was rationed in this country. For months after the war ceased sugar remained as one of the few products still rationed. To a brief writer, sitting in a law library and examining law books, sugar might seem to be an abstract thing; but to the American housewife, struggling to make sugar ration points supply the sugar demands of her husband, children and herself during the sugar rationing period, an adequate supply of sugar was a very important part of the American economy, and anything that restrained the flow

of sugar from its source in the beet fields to its destination on the dining table or kitchen of the housewife was of vital interest to her, to her family and to the American people!

The mere fact that the United States Government spent millions of dollars in paying sugar subsidies to "local" producers of sugar beets (7 U.S.C. 1134) likewise shows that sugar was of tremendous national importance.

If a conspiracy regarding the retail liquor business in Colorado had "the substantial economic effect upon interstate commerce necessary to bring it within the Sherman Act", as the Supreme Court held in *U. S. v. Frankfort Distilleries*, 324 U. S. 293, then surely a conspiracy to create a monopoly and fix prices paid the producers of sugar beets in California had sufficient substantial economic effect upon interstate commerce necessary to bring it within the scope of the same Sherman Act!

9. The Claim Is Not a Stale Claim.

Respondent argues that plaintiff's claim is a "stale claim between private litigants with reference to practices which ceased over 5 years ago." The claim is not stale. Laches or staleness of demand is a defense in equity, and does not apply to actions at law. In equity the defense of staleness only arises when under the facts it would be inequitable to allow the plaintiff to proceed. It is based upon estoppel. (*Maguire v. Hibernia Society*, 46 Pac. (2d) 673, 23 Cal. (2d) 719, 736; *Mott v. Holmes* (Sup. Ala.), 20 So. (2d) 461, 466; 30 C. J. S. p. 522, par. 112, p. 523, par. 113; 19 Am. Jur. p. 346, sec. 501, p. 352, sec. 508; 34 *idem*, p. 15, Par. 5). No such claim is made herein. In California, in both legal

and equitable actions, mere lapse of time, other than provided in the Statute of Limitations, does not bar relief. (*Maguire v. Hibernia Savings and Loan Society*, 23 Cal. (2d) 719, 736.)

Congress suspended all statutes of limitations on Sherman Act actions until June 30, 1946, (15 U.S.C., par. 16, Act Oct. 10, 1942, C. 589, 56 Stat. 781, amended June 30, 1945, C. 213, 59 Stat. 306), and the congressional statute governs. (*Holmberg v. Ambrecht*, 327 U. S. 293, 395.)

The fact that the conspirators have ceased their wrongful conspiracy does not excuse them from the statutory penalty of the Sherman Act. If it did, no private person could ever recover under the Sherman Act, because the unlawful acts would always cease before trial.

In *Addyston Pipe and Steel Co. v. U. S.*, 175 U. S. 211, the Supreme Court, on Dec. 4, 1898, held the respondents therein guilty of a violation of the Sherman Act. In *Chattanooga Foundry Works v. Atlanta*, 203 U. S. 241, the Supreme Court, on Dec. 3, 1906, upheld an action by the City of Atlanta as a private person for treble damages against one of the same conspirators arising out of the same conspiracy. This was almost 6 years after the conspirators had ceased any of the acts complained of, over 9 years after the action had commenced, and almost 12 years after the conspiracy had started. The Supreme Court found no stale demand there involved and affirmed the judgment. The times involved herein are even less.

10. The District Court Erroneously Held That Farmers Who Either Had to Sign the Crop Contract Prepared by the Conspirators or Not Grow Any Sugar at a Time When Sugar Was Vitally Needed by This Nation, Were in Pari Delicto and Could Not Recover Because They "Joined the Conspiracy and Furthered the Object of the Same" by Signing the Contract. Respondents Made No Effort to Support This Ruling Before the Circuit Court of Appeals or in Their Brief in Opposition to the Granting of Certiorari but the Circuit Court of Appeals, Instead of Repudiating Such a Holding Stated: "We Do Not Reach and Therefore Make No Expression Upon This Claim." The Circuit Court of Appeals Erred in so Doing. The Doctrine Enunciated by the District Court Would Result in Making "Private Remedies Under the Sherman Act Illusory if Not Non-Existent" for Many, Perhaps Most, Victims of Restraint of Trade. Respondents Conceded Error by Making No Attempt to Support the Doctrine and Not Urging It on Appeal. The Circuit Court of Appeals Should Not Have Remained Passive When Faced With Such a Doctrine but Should Have Definitely Repudiated It. This Court Should Establish Uniformity by Repudiating the District Court's Doctrine.

Plaintiffs, faced with the choice of either not growing sugar beets or signing one of the conspirators' contracts, signed the contracts, secured the seed, grew the sugar beets, and delivered them to the only manufacturing source available, one of the conspirators' refineries. The district judge held that this made the farmers co-conspirators. *Respondents made no effort to support this*

ruling before the Circuit Court and in their Brief in Opposition to Petition for Writ of *Certiorari* disavowed urging it on appeal. (p. 20). The Circuit Court of Appeal however, ignored the disavowal and permitted the ruling of the District Court to stand.

Even if the plaintiffs knew of the conspiracy, they could nevertheless recover. From the days of Lord Mansfield (*Browning v. Morris* (1778), 98 Eng. Reprint 1364), it has been uniformly held that "where contracts or transactions are prohibited by positive statute for the sake of protecting one set of men from another set of men, the one, from their situation and condition, being liable to be oppressed or imposed upon by the other, there the parties are not in *pari delicto*." (See, also, 12 Am. Jur. 735, Sec. 218; *McAllister v. Drapeau* (1939), 14 Cal. (2d) 102, 112.)

In *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U. S. 359, 377, it was held that where a plaintiff "had complied with the defendant's restrictive terms of sale merely for the reason that otherwise he could not purchase or secure the goods necessary for the conduct of its business" he was not in *pari delicto*.

This was followed in *Rankin v. Associated Bill Posters*, 42 F. (2d) 152, 155 (cert. den. 282 U. S. 864); *Hartford Empire Co. v. Glenshaw Glass Co.*, 47 Fed. Supp. 710, 711, *Ring v. Spina* (C. C. A. 2d, 1945), 148 F. (2d) 647, 652, and *Sola Electric Co. v. Jefferson etc. Co.*, 317 U. S. 173.

Ring v. Spina presents a situation almost identical with the one at bar. There the plaintiff sued under the Sherman Act, alleging that the restraint of trade was accomplished by means of the agreement of the Dramatists Guild. Plaintiff signed it because otherwise he could not have produced his play. The District Court held, as did the district judge here, that by signing the agreement the plaintiff became *in pari delicto*. This was reversed by the Second Circuit, which stated, 148 F. (2d) 647, 652:

"It is well settled that where one party to an illegal contract acts under the duress of another the parties are not *in pari delicto*. (Citing authorities.)

And in actions for triple damages under the Sherman Act a showing of economic duress similar to that asserted here has been held sufficient proof that the plaintiff is not a party to the monopoly. (Citing cases.)

"But here even without a showing of economic coercion as the final step in forcing him to sign the Basic Agreement, plaintiff is precisely the type of individual whom the Sherman Act seeks to protect from combinations fashioned by others and offered to such individual as the only feasible method by which he may do business. Considerations of public policy demand court intervention in behalf of such a person, even if technically he could be considered *in pari delicto*. Indeed, this is a general principle applicable beyond the anti-trust field. (Citing cases.)

Any other conclusion would mean that for

many, perhaps most, victims of restraint of trade, private remedies under the Sherman Act would be illusory, if not quite non-existent."

Faced with this doctrine, which respondents did not urge on appeal, and which as the Second Circuit said, means "that many, perhaps most, victims of restraint of trade, private remedies under the Sherman Act would be illusory, if not quite non-existent," the Circuit Court of Appeals remained passive and said:

"We do not reach and therefore make no expression upon this claim."

We respectfully submit that such doctrine should have been repudiated instead of being permitted to remain as the rule of the Southern District of California, and that the Supreme Court, in order to secure uniformity within the circuits and to protect victims of restraint of trade should apply the *Ring v. Spina* doctrine in this case. This issue of law must be determined in view of the District Judge's ruling, and this is the logical time and place for that determination. *Respondents by declining to urge the doctrine, must be taken as conceding that the district court erred in expounding it.* Either the District Court was right or it was wrong in its stand on this point. If respondent claims the District Court was right, it should reply to our authorities; if respondent concedes that the District Court is wrong, it should frankly so state.

IV.

CONCLUSION

If the decision of the Circuit Court of Appeals remains as the law in the Ninth Circuit, the farmers of that vast area will be deprived, for all practical purposes, of the benefits of the Sherman Act; they will be helpless before the price-fixing and price-maintenance conspiracies and monopolies of refineries, packers, canners and processors, who can adopt the technique used by the conspiring sugar refiners herein of fixing prices and conspiring as to farmers, state by state, as long as they restrict their processing, canning, packing, refining, etc., to the state in which the products were produced by the farmers before shipping the completed product into interstate commerce.

We respectfully submit that such is not the law as enunciated by the Supreme Court of the United States for many years and that the Judgment of the Circuit Court of Appeals and the District Court should be reversed and the doctrine of the *Big Three Tobacco Companies* cases should be made applicable to the Ninth Circuit as well as the rest of the country.

"The commerce clause of the Constitution is not to be interpreted so as to deny to Congress the power to make effective its regulation of interstate commerce. Where that effectiveness depends upon a regulation or prohibition attaching, regardless of whether the particular transaction in issue is inter-

state or intrastate in character, a transaction that concerns a business generally in interstate commerce, Congress may act. Such is this case."

U. S. v. Walsh (May 19, 1947), 91 U. S. Sup. Ct. L. Ed. A.O. 1175.

Congress "has declared that the rule of trade and commerce should be competition, not combination." (*U. S. v. Crescent Amusement Co.*, 323 U. S. 173, 187, and that declaration protects farmers as well as buyers. (*Swift & Co. v. U. S.*, 196 U. S. 375; 286 U. S. 105; *U.S.A. v. American Tobacco Co.*, 221 U. S. 106; *American Tobacco v. U. S.* 328 U. S. 781; *Local 167 v. U. S.*, 291 U. S. 293; *U. S. v. Borden*, 308 U. S. 188.)

The Sherman Act is a "Charter of Freedom" for producers as well as consumers.

Respectfully submitted,

GUY RICHARDS CRUMP,
Attorney for Petitioners.

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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1300

75

MANDEVILLE ISLAND FARMS, INC., a Corporation, and
ROSCOE C. ZUCKERMAN,

Petitioners,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI.

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Of Counsel.

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I.

The cause of action sued upon is a stale claim between private litigants with reference to practices which ceased over five years ago. It presents no question whatever of importance or of public interest such as would warrant a review by this honorable court

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II.

The decision of the Circuit Court of Appeals is not in conflict either with applicable decisions of this court or those of other Circuit Courts of Appeals.....

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III.

The decisions relied upon by petitioners are either based upon regulatory statutes in which Congress has, in order to protect interstate commerce, expressly stated its intention to deal with activities which in isolation are purely local, or are distinguishable on their facts, or both.....

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Conclusion

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In the Supreme Court of the United States

OCTOBER TERM, 1946.

No. 1300

MANDEVILLE ISLAND FARMS, INC., a Corporation, and
ROSCOE C. ZUCKERMAN,

Petitioners,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The cause of action attempted to be stated in this case centers about a form of sugar beet contract between a California sugar processor on the one hand and two local sugar beet growers on the other, which contract was in use during the crop years 1939, 1940 and 1941. [R. 77, 96, 36-59.] Prior to and subsequent to such years the respective contracts in effect between the respondent processor and the petitioning beet growers provided that the latter should be paid for their beets (according to the sugar content thereof) upon the basis of the net return to the processor from sugar manufactured by the latter at its California plant and sold during the particular crop year, final settlement to be made at the close of such year. [R. 89-96.] No complaint is made as to this type of contract. [R. 74-75.]

During the crop years 1939, 1940 and 1941, however, the respective contracts in use provided that the growers

should be paid for their beets upon the basis of the average net sugar return to respondent and to two other sugar processors in business in central California, final settlement again to be made at the close of the particular crop year involved.

Upon this state of facts, plaintiff growers filed this action against defendant processor on July 30, 1945, charging a conspiracy in violation of the anti-trust laws. 15 U. S. C. §15. The District Court granted a motion to dismiss, 64 F. Supp. 265 [R 100-108] and the Circuit Court of Appeals for the Ninth Circuit affirmed. 129 F. (2d) 71. [R. 120-121.] Petitioners' petition for rehearing was denied by the latter court March 27, 1947, [R. 123.]

The holding of both the District Court and the Circuit Court of Appeals was, in substance, that the activities complained of, being local in their nature, did not come within the purview of the Sherman Act, since no effect upon interstate commerce had been shown.

As material to these holdings, it may be pointed out preliminarily, that the contracts were entered into before the beets were grown; that the beets were planted, harvested, delivered to the processor and by it manufactured into sugar wholly within the confines of California; that it was sugar, not the beets, which ultimately moved in interstate commerce and was sold in interstate markets; that the sugar was sold before the price to the growers for their beets, whether averaged or not, was finally determined; and that petitioners themselves recognized that the method of determining the price of the beets had no effect upon the price or the marketing conditions of the sugar—the interstate commodity—when they alleged both

in their original and in their amended complaint that the sugar manufacturers "regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, paid all growers of sugar beets in California north of the 36th parallel, the same price for the same amount of beets of the same sugar content." [R. 11, 76-77.] In a word, nothing was alleged by them to show—indeed the facts just quoted indicate the contrary—that the asserted conspiracy of which they complain operated in any way to fix or to affect the price of the commodity—sugar—which moved in interstate commerce. Compare, for instance, *United States v. Univis Lens Co.*, 316 U. S. 241, 252-253; *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 495-496 and, lastly, *Wickard v. Filburn*, 317 U. S. 111, 125, with its kindred holding that the presence or absence of a *substantial economic effect upon interstate commerce* is the test as to the applicability of the Sherman Act.

Summary of Argument.

I. The cause of action sued upon is a stale claim between private litigants with reference to practices which ceased over five years ago. It presents no question whatever of importance or of public interest such as would warrant a review by this Honorable Court.

II. The decision of the Circuit Court of Appeals is not in conflict either with applicable decisions of this Court or those of the other Circuit Courts of Appeal.

III. The decisions relied upon by petitioners are either based upon regulatory statutes in which Congress has, in order to protect interstate commerce, expressly stated its intention to deal with activities which in isolation are purely local, or are distinguishable on their facts, or both.

ARGUMENT.

I.

The Cause of Action Sued Upon Is a Stale Claim Between Private Litigants With Reference to Practices Which Ceased Over Five Years Ago. It Presents No Question Whatever of Importance or of Public Interest Such as Would Warrant a Review by This Honorable Court.

The record reveals that the conspiracy charged had to do only with the crop years 1939, 1940 and 1941. [R. 74-76; 78-79.] Under the anti-trust laws of California, in so far as any asserted local transgressions were involved, any cause of action in plaintiffs was barred within three years. *California Business and Professions Code*, §§16720-16758; *California Code of Civil Procedure*, §359, pleaded at R. 33, 97. And, but for the wartime moratorium with reference to the anti-trust laws of the United States, the same fate would have befallen their claim in the Federal jurisdiction. 15 U. S. C. §16.

The moratorium in question thus permitted them to enter the Federal court. But even then they failed to show that violation of public rights which even a private litigant must show in order to state a cause of action under the Sherman Act. See *Wilder Manufacturing Co. v. Corn Products Co.*, 236 U. S. 165, 174; *Glenn Coal Co. v. Dickinson Fuel Co.*, 4 Cir., 72 F. (2d) 885, 889; *Abouaf v. Spreckels Co.* (N. D. Cal.), 26 F. Supp. 830, 833; *Lynch v. Magnavox Co.*, 9 Cir., 94 F. (2d) 883, 891. These cases all reflect the principle that the Sherman Act was designed to protect the consuming public

from monopolies and restraint of trade with reference to commodities passing in interstate commerce; and that the individual cause of action conferred by 15 U. S. C. §15 was but incidental and subordinate to this main purpose. As said in the *Glenn Coal* case (a case which, by the way, is excellent authority for the proposition that most of the allegations of the complaint herein as to the result of the alleged conspiracy are mere conclusions of law):

"* * * It is well known that the main purpose of the Anti-Trust Act was to protect the public from monopolies and restraint of trade and the individual right of action was but incidental and subordinate. This was well expressed by Mr. Chief Justice White in *Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S. 165, 174, 35 S. Ct. 398, 401, 59 L. Ed. 520, Ann. Cas. 1916A, 118, in the following language:

"In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute, but the remedies which it provided, were coextensive with such conceptions."

"Thus, the declaration to be good must show not only damages sustained by the individual plaintiff but even more importantly a violation of public rights prohibited by the Act. It is not sufficient that the declaration shows merely a good cause of action at common law." (72 F. (2d) at p. 889.)

It is obvious, of course, that petitioners made no showing whatever with reference to this important element of their cause of action. There was no consuming public so far as the beets were concerned. The only segment of the public which could have been involved under the facts of this case would have been the consumers of the sugar, for this was the only commodity which reached the public, either through the channels of interstate commerce or otherwise. True, the complaint attempts to set up damage so far as the individual appellants are concerned; but it utterly fails to allege one single fact which would show that the interests of the consuming public were in any way affected. The result is that for this reason alone petitioners wholly failed to make out a case, let alone the fact that it was not until 1945 that they decided to press a stale claim which was saved to them only by the fortuitous circumstances of a war-time moratorium. For these reasons it is respectfully urged that there is here present no element of importance or of public interest which would warrant the granting of *certiorari*.

We now turn to the specific reasons relied upon by petitioners for the allowance of the writ, which if we read them aright, are two in number; first, that the Circuit Court of Appeals has decided a federal question in a way probably in conflict with applicable decisions of this Court and, second, that the decision of the Circuit Court of Appeals is in conflict with decisions in other circuits.

II.

The Decision of the Circuit Court of Appeals Is Not in Conflict Either With Applicable Decisions of This Court or Those of Other Circuit Courts of Appeals.

In order intelligently to discuss the reasons relied upon by petitioners, it is first incumbent upon us to determine just what the decision of the Circuit Court of Appeals was. Its effect was to approve the District Court's holding as to the failure of the amended complaint to state a claim under the Sherman Act, which, of course, refers us back to the opinion of the learned District Judge. 64 F. Supp. 265. [R. 100-108.]

The holding of the District Court in this regard was twofold. It agreed with the contention of respondent "that the raising of the beets, the sale to the refineries for the purpose of processing the same into sugar is an intra-state matter and beyond the reach of the Sherman Act." [R. 102.] And in conclusion the District Judge said:

"It appears clear that the decisions of our courts have consistently held throughout the life of the Anti-Trust Act that products of the farm which are subsequently manufactured or processed into articles of commerce are beyond the reach of said Act."

Such was the holding which was approved by the Circuit Court of Appeals. We are thus led to inquire, as to petitioners' reasons for the allowance of the writ, just what decisions of this Court or of other Circuit Courts of Appeal hold to the contrary? What decisions in the

Federal appellate jurisdiction, if any, hold that transactions with reference to local products which are subsequently manufactured into articles of commerce are subject to the Sherman Act? And, in particular, what decisions so hold where, as here, there was an utter failure to show any effect, let alone a substantial economic effect upon either the price or the supply of the sugar—the interstate commodity involved? We are frank to say that we have found none, and we gather that petitioners have found none either, for they have cited no case even remotely in point as to the question under discussion.

On the other hand, the authorities in the Federal appellate jurisdiction are legion to the effect that the purpose of the Sherman Act was to protect the consuming public—here the buyers of the sugar—from artificial tampering with the price or supply of the interstate commodity; a situation totally lacking here. We cite a few pertinent holdings:

1. The production and manufacture of goods or commodities is not commerce within the meaning of the Sherman Act. *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers International Union v. Herkert and Meisel Trunk Co.*, 265 U. S. 457; *Industrial Association v. United States*, 268 U. S. 64; *Coronado Coal Co. v. United Mine Workers*, 268 U. S. 295; *Robinson v. Suburban Brick Co.*, 4 Cir., 127 Fed. 804; *Gable v. Vonnegut Mach. Co.*, 6 Cir., 274 Fed. 66.

2. The purpose of the Sherman Act is to prevent restraints upon free competition which tend toward market control of a commodity passing in interstate commerce, such as monopolizing the supply, controlling the price or discriminating between its would-be purchasers or con-

sumers; there must be, in order to invoke the sanctions of the Act, some form of restraint which is so substantial as to affect market prices of the interstate commodity. *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 490, 493, 495-501.

3. Where, as here, the activities complained of are local, and hence may not be regarded as interstate commerce, they may only be brought within the purview of the Act if they exert a substantial economic effect upon interstate commerce, as by affecting the price or by restricting the supply. *Apex Hosiery Co. v. Leader*, *supra*; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211; *Standard Oil Co. of Indiana v. United States*, 283 U. S. 163; *Local 167 etc. v. United States*, 291 U. S. 293.

4. The principle that the production and manufacture of goods or commodities is not commerce applies as well to sugar as to any other commodity. *Utah-Idaho Sugar Co. v. Federal Trade Commission*, 8 Cir., 22 F. (2d) 122; and compare, although not in the Federal appellate jurisdiction, *Dothan Mill Co. v. Espy*, 220 Ala. 605, 127 So. 178 (alleged local combination to fix prices to be paid growers of cotton seed which was later processed into cottonseed oil, the latter being shipped in interstate commerce; held, not within the purview of the federal anti-trust laws but that defendants were amenable to the state law).

It is submitted that the holding of the Circuit Court of Appeals in the instant case is wholly in line with the principles announced in the above decisions of this Court and of the other Circuit Courts of Appeal; and hence that the twin claims of conflict in the decisions must necessarily fail.

III.

The Decisions Relied Upon by Petitioners Are Either Based Upon Regulatory Statutes in Which Congress Has, in Order to Protect Interstate Commerce, Expressly Stated Its Intention to Deal With Activities Which in Isolation Are Purely Local, or Are Distinguishable on Their Facts, or Both.

It will have been noted that petitioners, in their attempt to torture the activities complained of into a Sherman Act pattern, have largely had recourse to decisions based upon subsequently enacted regulatory statutes in which, in order to *protect* interstate commerce, Congress has explicitly declared its intention to deal with matters which in isolation are purely local.

We thus find petitioners citing decisions based upon statutes in which Congress, in the exercise of its powers under the commerce clause, dealt expressly with such subjects as:

1. Employees engaged in commerce or in the production of goods for commerce. (Fair Labor Standards Act, 29 U. S. C. Sec. 207.)

2. Labor disputes "affecting commerce," which latter words mean "in commerce, or *burdening or obstructing commerce or the free flow of commerce*, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce." (National Labor Relations Act, 29 U. S. C. Sec. (7).)

3. Food products, considered to be in commerce if "part of that current of commerce usual in the livestock and meat-packing industries, whereby livestock, meats, meat food products, livestock products, dairy products,

poultry, poultry products, or eggs, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for slaughter of livestock within the State and the shipment outside the State of the products resulting from such slaughter." (Packers and Stockyards Act, 7 U. S. C. Sec. 183.)

4. Tobacco, transactions with reference to which, are considered to be in commerce under substantially similar conditions as those expressed as to the above mentioned food products. (Tobacco Inspection Act, 7 U. S. C. Sec. 511(i).)

5. Agricultural commodities, as to which the term "affect interstate and foreign commerce" means, among other things, "in such commerce, or to burden or obstruct such commerce or the free and orderly flow thereof; or to create or tend to create a surplus of any agricultural commodity which burdens or obstructs such commerce or the free and orderly flow thereof." (Agricultural Adjustment Act, 7 U. S. C. Sec. 1301(4).)

As against these detailed congressional definitions we have the comparatively simple pattern of the older statutes: restraint of trade or commerce in the Sherman Act, unfair or deceptive methods of competition or practices in commerce in the Federal Trade Commission Act and the phrase "in commerce, in the course of such commerce" found in the Clayton Act. In addition to this, we have the highly significant fact that Congress has never amended the Sherman Act, despite the fact that over the years the courts have, as we have seen, consistently interpreted it as outlawing only acts directly affecting inter-

state-commerce (the earlier concept), or at the very least having a *substantial* economic effect upon interstate commerce. *Wickard v. Filburn, supra.*

The end product of petitioners' attempt to use these later and more detailed regulatory statutes as vehicles of interpretation of such earlier and more general statutes as the Sherman Act, seems to be the claim that since, as it is said, Congress in passing the latter, "exercised all the power it possessed," every form of local activity brought within the purview of these various later enactments for the *protection* of interstate commerce in the various and sundry fields with which they deal, now *constitutes* interstate commerce *within the meaning of the Sherman Act.*

Bearing in mind that the Sherman Act is, in its more serious aspects, a penal statute, with the attendant constitutional requirement of a definite guide or standard of conduct, compare, for instance, *Cline v. Frink Dairy Co.*, 274 U. S. 445, 458, such a contention as this would seem to envisage legislation by implication with a vengeance. Fortunately, however, the decisions of this Court afford a complete answer to petitioners' contentions along this line.

In *Apex Hosiery Co. v. Leader, supra*, 310 U. S. at p. 495, it was pointed out that

"It was in this sense of preventing restraints on commercial competition that Congress exercised 'all the power it possessed'."

And it is perfectly obvious from the balance of the opinion that the "commercial competition" to which the Court then had reference related wholly to competition in the marketing of goods or commodities passing *in interstate commerce*; and no such restraint has here been made to appear.

The case of *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349, squarely holds that the later and more detailed regulatory statutes afford no reliable guide for the interpretation of such earlier statutes as the Sherman Act, the Federal Trade Commission Act, and the Clayton Act. In that case the Federal Trade Commission issued a cease and desist order against Bunte Bros. forbidding it from selling candy in so-called "break and take" packages, on the ground that such sales, which were made wholly in Illinois, enabled it to compete unfairly with interstate competitors, who had been barred by the Commission from using this method of selling. The following quotations from the opinion affirming the order of the Circuit Court of Appeals setting aside the Commission's order illustrate the unwisdom of attempting to utilize statutes having materially different objects and standards as vehicles of interpretation of other acts:

"While one may not end with the words of a disputed statute, one certainly begins there. 'Unfair methods of competition in commerce' are the concern of §5, and the Commission is 'directed to prevent persons . . . from using unfair methods of competition in commerce. . . .'. The 'commerce' in which these methods are barred is interstate commerce. Neither ordinary English speech nor the considered language of legislation would aptly describe the sales by Bunte Brothers of its 'break and take' assortments in Illinois as 'using unfair methods of competition in [interstate] commerce.' *When in order to protect interstate commerce Congress has regulated activities which in isolation are merely local, it has normally conveyed its purpose explicitly.** See, for

*Emphasis here, as elsewhere, is added.

example, National Labor Relations Act [July 5, 1935] 49 Stat. at L. 449, 450, 453, chap. 372, §§2 (7), 9(c), 10(a), 29 U. S. C. A. §§152(7), 159(c), 160(a); Bituminous Coal Act [April 26, 1937] 50 Stat. at L. 72, 83, chap. 127, §4-A, 15 U. S. C. A. §834; Federal Employers' Liability Act [April 22, 1908] 35 Stat. at L. 65, chap. 149, §1, as amended [August 11, 1939] 53 Stat. at L. 1404, chap. 685, 45 U. S. C. A. §51" (pp. 350-351).

* * * * *

"Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business. The Interstate Commerce Act and the Federal Trade Commission Act are widely disparate in their historic settings, in the enterprises which they affect, in the range of control they exercise, and in the relation of these controls to the functioning of the federal system" (p. 353).

* * * * *

" * * This case presents the narrow question of what Congress did, not what it could do. And we merely hold that to read 'unfair methods of competition in [interstate] commerce' as though it meant 'unfair methods of competition in any way effecting interstate commerce,' requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished" (p. 355).*

As a matter of fact, petitioners themselves, in utilizing regulatory statutes such as the Fair Labor Standards Act as the basis of their contention that the case made by petitioners falls within the scope of the Sherman Act, are running wholly counter to their own argument that decisions such as *Coe v. Errol*, 116 U. S. 517, and *Parker v. Brown*, 317 U. S. 341, 360, should be limited to situations

involving local taxation or regulation; a proposition with which we are not called upon to disagree.

As for the Sherman Act cases cited by appellants, they typify such a situation as we would have here if the price of the *sugar* had been fixed at destination; that is to say, if the price of the very commodity passing through interstate channels had been fixed by agreement. Were ours such a factual picture as those cases envisage, we would not waste the time of any court in attempting to defend it. But this has nothing whatever to do with the situation involved herein where the price of the interstate commodity was not affected at all by the activities complained of.

Specifically, the following anti-trust cases relied upon by appellants are not in point because the restraints or other activities complained of related to the interstate commodity itself, as here the *sugar*.

W. W. Montague & Co. v. Lowry, 193 U. S. 38;

United States v. Frankfort Distilleries, 324 U. S. 293;

Ethyl Gasoline Corp. v. United States, 309 U. S. 436;

Food & Grocery Bureau of Southern California v. United States, 9 Cir., 139 F. (2d) 973;

Fitch v. Kentucky Light & Power Co., 6 Cir., 138 F. (2d) 12;

United States v. Aluminum Co. of America, 148 F. (2d) 416;

United States v. Masonite Corp., 316 U. S. 265, 281;

United States v. Bausch & Lomb Optical Co., 321 U. S. 707;

C. E. Stevens Co. v. Foster & Kleiser, 311 U. S. 252;

Gibbs v. McNeeley, 9 Cir., 118 Fed. 120;

United States v. Socony-Vacuum Oil Co., 310 U. S. 150;

United States v. Southeastern Underwriters Assn., 322 U. S. 533;

Montrose Lumber Co. v. United States, 10 Cir., 124 F. (2d) 573;

White Bear Theatre Corp. v. State Theatre Corp., 8 Cir., 129 F. (2d) 600;

California Retail Grocers and Merchants Assn. v. United States, 9 Cir., 139 F. (2d) 978;

Local 167 I. B. T. etc. v. United States, 291 U. S. 293, 297;

United States v. General Motors Corp., 7 Cir., 121 F. (2d) 376;

Johnson v. Joseph Schlitz, 33 Fed. Supp. 176;

Associated Press v. United States, 326 U. S. 1;

American Tobacco Co. v. United States, 328 U. S. 781;

Corn Products Refining Co. v. United States, 324 U. S. 726;

United States v. Univis Lens Co., 312 U. S. 241;

Dr. Miles Medical Co. v. John D. Park & Sons, 220 U. S. 373.

The following cases are of no aid here because grounded upon statutes in which, as we have seen, Congress provided explicitly for the regulation of matters which in

isolation are purely local (compare *Federal Trade Commission v. Bunte Bros., Inc.*, quoted *supra*):

Cases under the Fair Labor Standards Act:

Walling v. Amidon, 10 Cir., 153 Fed. 159;

Armour v. Wintock, 323 U. S. 126;

Roland Electric Co. v. Walling, 90 U. S. Adv. Op. 326;

Martino v. Michigan Window Cleaning Co., 90 U. S. Adv. Op. 386;

Borden Co. v. Borella, 325 U. S. 679;

Boutelle v. Walling, 90 U. S. Adv. Op. 520;

United States v. Darby, 312 U. S. 100;

Matee v. White Plains Publ. Co., 90 U. S. Adv. Op. 455;

Overnight Motor Transportation Co. v. Missel, 316 U. S. 572;

Hamlet Ice Co. v. Fleming, 4 Cir., 127 F. (2d) 165;

Schulte v. Gangi, 326 U. S. 712.

National Labor Relations Act:

Santa Cruz Fruit Packing Co. v. N. L. R. B., 303 U. S. 453;

N. L. R. B. v. Van de Kamp's, 9 Cir., 152 F. (2d) 818;

N. L. R. B. v. Fainblatt, 306 U. S. 601;

N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U. S. 1.

Other similar statutes:

Curran v. Wallace, 306 U. S. 1 (Federal Tobacco Inspection Act);

Mulford v. Smith, 307 U. S. 38 (Agricultural Adjustment Act);

Wickard v. Filburn, 317 U. S. 111 (same);

United States v. Rock Royal Coop., Inc., 307 U. S. 533 (Agricultural Marketing Act);

United States v. Wrightwood Dairy Co., 315 U. S. 110 (same);

Stafford v. Wallace, 258 U. S. 495 (Packers and Stockyards Act).

Conclusion.

We shall take neither the time nor the space to discuss in detail the various arguments advanced by petitioners. However, a few brief comments are, we think, warranted.

Petitioners' theories as to the nature of the decision of the Circuit Court of Appeals (Petn. and Br., pp. 20-25) are wholly belied by the record. That court held, as we have earlier indicated, that the activities complained of, being local in their nature, did not come within the purview of the Sherman Act because no effect upon interstate commerce had been shown. Such holding is wholly in accord with applicable decisions of this Court and of the other circuits, as we have pointed out above.

The question of whether the entire sequence of events from the planting of the beet seeds to the appearance of the sugar upon the housewife's table constituted one inseparable transaction, as claimed, is wholly a false quantity in the case. Certainly, the courts below were entitled to take, and they did take, all of the facts into considera-

tion, *United States v. Southeastern Underwriters Assn.*, 322 U. S. 533, but their duty in this regard was at an end when they determined that no effect, let alone no substantial economic effect, upon interstate commerce had been shown.

It is wholly incorrect to say in the abstract that price fixing and price maintenance combinations are illegal *per se* under the Sherman Act. The statement is, of course, true, as to articles moving in interstate commerce, *United States v. Univis Lens Co.*, 316 U. S. 241, 251; but no such price fixing or price maintenance was here shown.

It is especially an injustice to the Circuit Court of Appeals to say that it applied the so-called "mechanical test" of direct or indirect effect upon interstate commerce, when that court was careful to point out its preference for the more accurate expression "substantial economic effect" as employed in *Wickard v. Filburn*. [R. 121.]

As for the claim that respondents "conceded" the existence of a conspiracy which damaged plaintiffs, the record is to the exact contrary. The motion to dismiss, of course, admitted such allegations as were well pleaded, for the purposes of the motion only, and that was all.

The claim that all that was sold to respondent by the petitioners was the sugar content of the beets, as distinguished from the beets themselves, is palpably an argument born of desperation and one which made its initial appearance during the course of the oral argument before the Circuit Court of Appeals.

The assertion that interstate commerce was "involved" because the price to the growers could not be determined until the sugar was sold is not only a complete *non-sequitur* as far as petitioners' claims are concerned, but it af-

firmatively demonstrates what respondent has argued throughout this entire case: that the asserted price fixing of the beets had no effect whatever upon the price of the sugar; and that to contend otherwise was to place the cart before the horse.

The complaint that the courts below stressed cases such as *Coe v. Errol*, 116 U. S. 517 and *Parker v. Brown*, 317 U. S. 371, in arriving at their respective decrees is of no moment, since the Sherman Act cases which we have earlier cited are to the same effect; as the Circuit Court of Appeals itself indicated when it declared that the citation of tax cases, while not approved, nevertheless presented no inconsistency in the decision. [R. 121.]

As for the *pari delicto* point, the same was not urged by respondent upon the appeal; nor was the question decided by the Circuit Court of Appeals. [R. 121.]

It is respectfully urged that the petition for *certiorari* should be denied.

Respectfully submitted,

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IN THE
Supreme Court of the United States

October Term, 1947.

No. 75.

MANDEVILLE ISLAND FARMS, INC., a corporation, and
ROSCOE C. ZUCKERMAN,

Petitioners,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE NINTH CIRCUIT.

RESPONDENT'S BRIEF.

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Respondent.

RESPONDENT'S BRIEF.

Statement of the Case.

The principal question presented is whether or not the activities complained of had that substantial economic effect upon interstate commerce (compare *Wickard v. Filburn*, 317 U. S. 111, 125) which the Sherman Act condemns.

The District Court held that they did not, and granted a motion to dismiss. 64 Fed. Supp. 265 [R. 100-108]. The Circuit Court of Appeals agreed and affirmed. 129 F. (2d) 71 [R. 120-121]. A petition for rehearing was duly filed and denied [R. 123], after which this Court granted certiorari. The specifications of error urged by petitioners all reflect, directly or indirectly, the basic question we have indicated above. In order to re-

solve that question, it is only necessary to apply the recognized concepts of the Sherman Act to the facts.

Since this matter was determined on a motion to dismiss, it follows that the well-pleaded facts set forth in the amended complaint are to be taken as true. *Glenn Coal Co. v. Dickinson*, 4 Cir., 72 F. (2d) 885, 887-8; *Alexander Milburn Co. v. Union Carbide and Carbon Corp.*, 4 Cir., 15 F. (2d) 678, 680; *International Visible Seams Corp. v. Remington-Rand, Inc.*, 6 Cir., 65 F. (2d) 540.

These facts are that for a period of three years (the so-called crop years of 1939, 1940 and 1941) the three sugar processors in California north of the 39th parallel adopted a practice of paying sugar beet growers, according to the sugar content of their beets, by a price determination formula based upon the average net returns from the sugar sold by all three of such processors during a given crop year.* These formulae were embodied in printed contracts which provided that the processor would furnish the seed, and the grower would plant, cultivate and harvest the crop and deliver the beets to the processor, who would then manufacture the beets into sugar. [R. 77, 96, 36-59.] All of these steps, it should be added, took place wholly within the State of California. It was only after the sugar was manufactured that any movement in interstate commerce was involved since it was the sugar—the finished product—which alone moved in interstate commerce.

*Before and since the three years in question, settlement has been made by respondent with the growers on the basis of the net returns from sugar sold by it during the current crop year.

It is also worthy of note that, since sugar is the interstate commodity here involved, any effect of the price-fixing alleged as to the *beets* upon the price of the *sugar* is expressly disclaimed by the complaint itself. It is alleged both in the original and in the amended complaint that the sugar manufacturers "*regardless of the price at which sugar was sold from any particular refinery or from any particular manufacturer's refinery or refineries, paid all growers of sugar beets in California north of the 36th parallel, the same price for the same amount of beets of the same sugar content.*"* [R. 11, 76-77.] In other words, petitioners recognize that irrespective of the effect of the conspiracy charged as to the price fixing of the *beets*, the *sugar* prices were not affected. This is made even more evident when it is noted that the *beets* were settled for at the *end* of the crop year, on the basis of the application of the formula to the *sugar* sold during that year and after the net returns from the *sugar* to the processors had been determined; a species of "reaching back" process whereby variable net returns to the processors were averaged to reach a constant as to the *beets*. Under such a process the finally computed beet price could have been nothing more than a mere derivation from the *sugar* prices and could not possibly affect the latter in the least.

Also, in the District Court petitioners affirmatively disavowed any attempt to charge a restraint as to the *sugar*.

*Emphasis here, as elsewhere, is supplied unless otherwise noted.

—4—

Due apparently to inadvertence, the original complaint charged a conspiracy to monopolize and restrain "trade and commerce in *sugar and sugar beets* among the several states and to unlawfully fix prices to be paid the growers of sugar beets." [R. 10.] At the argument on the motion to dismiss the complaint, the District Judge requested a clarification as to the matter of the *sugar*. Counsel for petitioners then stated that they would eliminate the reference to sugar and they did so in the amended complaint by alleging solely a conspiracy to monopolize and restrain "trade and commerce among the several states and to unlawfully fix prices to be paid the growers of sugar beets." [R. 75-76.]

It was upon the basis of this disavowal as to the *sugar*—the interstate commodity—that the District Judge ruled that no restraint upon interstate commerce was shown.

Reduced to its essentials, it will thus be seen that the case made by petitioners is one of the price-fixing of a product of the soil destined for manufacture and processing into a commodity ultimately to be shipped in interstate commerce, with any restraint or intent to restrain trade or commerce in the interstate commodity itself being distinctly disavowed.

Respondent urges the points which follow in support of its contention that the judgments below should be affirmed.

Summary of Argument.

I. The courts below did not err in holding the amended complaint insufficient for failure to state a claim under the Sherman Act.

A. The amended complaint failed to state a claim because it affirmatively appears therefrom that the activities complained of were neither in interstate commerce nor had any substantial effect or any effect whatever upon interstate commerce.

1. The intrastate planting, growing, harvesting, selling and manufacturing of farm products into a commodity destined for interstate shipment is not interstate commerce.

2. The amended complaint affirmatively discloses that the activities complained of had no effect whatever upon interstate commerce, let alone the substantial economic effect condemned by the Sherman Act.

B. The amended complaint failed to state a claim because it affirmatively appears therefrom that the activities complained of did not result in any violation of or injury to the public rights which it is the purpose of the Sherman Act to protect.

ARGUMENT.

I.

The Courts Below Did Not Err in Holding the Amended Complaint Insufficient for Failure to State a Claim Under the Sherman Act.

The requirements of a complaint filed by an individual under 15 U. S. C. §15 are nowhere better stated than in *Glenn Coal Co. v. Dickinson Fuel Co.*, 4 Cir., 72 F. (2d) 885, 889, where the court said, following an earlier decision of this Court:

"It is well known that the main purpose of the Anti-Trust Act was to protect the public from monopolies and restraint of trade and the individual right of action was but incidental and subordinate. This was well expressed by Mr. Chief Justice White in *Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S. 165, 174, 35 S. Ct. 398, 401, 59 L. Ed. 520, Ann. Cas. 1916A, 118, in the following language:

"In other words, founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute, but the remedies which it provided, were coextensive with such conceptions."

Thus, the declaration to be good must show not only damages sustained by the individual plaintiff but even more importantly a violation of public rights prohibited by the Act. It is not sufficient that the declaration shows merely a good cause of action

at common law. As was said by the Supreme Court in the Blumenstock case,* *supra*:

'In order to maintain a suit under this act the complaint must state a substantial case arising thereunder. The action is wholly statutory, and can only be brought in a District Court of the United States, and it is essential to the jurisdiction of the court in such cases that a substantial cause of action within the statute be set up.'"

Applying these principles to the case at bar, the deficiencies of the amended complaint immediately appear.

A. The Amended Complaint Failed to State a Claim Because It Affirmatively Appears Therefrom That the Activities Complained of Were Neither in Interstate Commerce Nor Had Any Substantial Effect or Any Effect Whatever Upon Interstate Commerce.

These beet contracts were executed before the beet seeds were even furnished to the growers or planted by them. The measure of the contract price for the beets was contractually established then and there. Then followed the growing and harvesting, the delivery of the beets to the processor and their manufacture into sugar. We also learn from the complaint that the sugar was then stored for long periods so that the sugar sold during a given crop year was mainly derived from beets grown and delivered during *previous* crop years. [R. 22, 26.]

Petitioners contend that *all* of these activities antecedent to the manufacture of the sugar not only "involved" interstate commerce, as they say, but were actually in interstate commerce itself. Their position is, with all respect, contrary both to reason and to authority.

**Blumenstock Bros. Advertising Agency v. Curtis Publishing Co.*, 252 U. S. 436.

In this regard, it will have been noted that petitioners' briefs reveal a studied confusion as between what is interstate commerce, on the one hand, and the undoubted power of Congress, under the commerce clause, to *protect* interstate commerce by the specific regulation of activities which in isolation are purely local, on the other.

We thus find them arguing, for instance, that under the pattern of the Fair Labor Standards Act ("Employees engaged in *commerce* or in the production of goods *for commerce*": 29 U. S. C. §207) both categories of employees are engaged in interstate commerce; a contention which is not only directly contrary to the plain wording of the Act, but is also directly contrary to this court's opinion in the case of *U. S. v. Darby*, 312 U. S. 100, a leading case sustaining the constitutionality of the Act in question. This Court there said:

"While manufacture is not of itself interstate commerce, the shipment of manufactured goods interstate is such commerce and the prohibition of such shipment by Congress is indubitably a regulation of the commerce. The power to regulate commerce is the power 'to prescribe the rule by which commerce is governed.' Gibbons v. Ogden, 9 Wheat. 1, 196."

This holding as to the non-interstate character of manufacturing is wholly consistent with concepts which, in so far as the Sherman Act is concerned, have been proclaimed time and time again. There has been, in the pronouncements of this Court, little variation as to what is or is not interstate commerce as such; the differences have been as to the effect of the activities complained of upon interstate commerce; a far different matter.

Thus the earlier cases spoke of "direct" and "indirect" effect; what is now regarded as a mechanical test. And

in *Wickard v. Filburn*, *supra*, it was said that the true test is whether the activities complained of have a *substantial economic effect* upon interstate commerce; an eminently fair test and one which we accept without qualification.

Petitioners' obvious position is, however, that everything within the regulatory power of Congress under the commerce clause is interstate commerce in and of itself; a position which, paradoxically enough, actually constitutes an attempted and erroneous limitation upon the powers of Congress because denying it the power to *protect* interstate commerce from the impact of extraneous forces deemed inimical to it.

This erroneous view of petitioners is made evident by passages in their supplemental brief such as that on page 11, where they say that *we* argue that the matters here involved would be interstate commerce under such statutes as the Fair Labor Standards Act, the National Labor Relations Act and the like, but are not such under the Sherman Act. With all respect, we argue nothing of the sort. We do argue, and we have all along, that other enactments of Congress covering different fields, having different purposes and with different historical backgrounds, are of little value here in determining whether the activities complained of were either *in* interstate commerce or had a substantial economic effect *upon* it within the meaning of the Sherman Act. And in this we are not without support from this Court, for it also has recognized that a translation of implications from the special aspects of one statute under the commerce clause to another may lead to "pitfalls," *Overstreet v. North Shore Corp.*, 318 U. S. 131, and is in general "treacherous business." *Federal Trade Commission v. Bunte Bros.*, 312 U. S. 349.

In other words, petitioners seem to claim that anything within the purview of any commerce clause statute is interstate commerce *per se*, which we deny. On the other hand, we assert that the activities here complained of were neither *in* nor had any substantial economic effect *upon* interstate commerce. The issue is thus clearly drawn; and we now turn to a discussion of those two questions.

1. *The Intrastate Planting, Growing, Harvesting, Selling and Manufacturing of Farm Products into a Commodity Destined for Interstate Shipment Is Not Interstate Commerce.*

As we have seen, even under the Fair Labor Standards Act the manufacture of goods for commerce is not commerce itself. *U. S. v. Darby, supra*. And *a fortiori* thus must be true of acts antecedent to the manufacture such as, in our case, the planting, growing, harvesting and purchase of the beets for manufacture by the processor.

This conclusion is wholly in line with an unbroken line of authorities under the Sherman Act, which uniformly hold that the production and manufacture of goods or commodities is not commerce even though the finished product, as here the sugar, is destined for interstate shipment. *United Mine Workers of America v. Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers International Union v. Herkert and Meisel Trunk Co.*, 265 U. S. 457; *Industrial Association v. United States*, 268 U. S. 64; *Robinson v. Suburban Brick Co.*, 4 Cir., 127 Fed. 804; *Gable v. Vonnegut Mach. Co.*, 6 Cir., 274 Fed. 66.

Thus in the *Herkert and Meisel Trunk Co.* case it was said, first quoting from *United Mine Workers v. Coronado Coal Co.*:

"Coal mining is not interstate commerce, and the power does not extend to its regulation as such. In *Hammer v. Dagenhart*, 247 U. S. 251, 272, 62 L. ed. 1101, 1105, 3 A. L. R. 649, 38 Sup. Ct. Rep. 529, Ann. Cas. 1918E, 724, we said: 'The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped or used in interstate commerce make their production a part thereof. *Delaware, L. & W. R. Co. v. Yurkonis*, 238 U. S. 439, 59 L. ed. 1397, 35 Sup. Ct. Rep. 902.' Obstruction to coal mining is not a direct obstruction to interstate commerce in coal, although it, of course, may affect it by reducing the amount of coal to be carried in that commerce. The same rule was followed in *Gable v. Vonnegut Machinery Co.*, 274 Fed. 66, 73, 74.

The same general principles are affirmed in *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 259, 67 L. ed. 237, 43 Sup. Ct. Rep. 83; *Crescent Oil Co. v. Mississippi*, 257 U. S. 129, 136, 66 L. ed. 166, 42 Sup. Ct. Rep. 42; *Arkadelphia Mill Co. v. St. Louis Southwestern R. Co.*, 249 U. S. 134, 151, 63 L. ed. 517, 527, P. U. R. 1919C, 710, 39 Sup. Ct. Rep. 237; *McCluskey v. Marysville & N. R. Co.*, 243 U. S. 36, 38, 61 L. ed. 578, 579, 37 Sup. Ct. Rep. 374; *Diamond Glue Co. v. United States Glue Co.*, 187 U. S. 611, 616, 47 L. ed. 328, 332, 23 Sup. Ct. Rep. 206; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 245, 46 L. ed. 171, 175, 22 Sup. Ct. Rep. 120; *United States v. E. C. Knight Co.*, 156 U. S. 1, 12, 13, 39 L. ed. 325, 329, 15 Sup. Ct. Rep. 249; *Kidd v. Pearson*, 128 U. S. 1, 20, 21, 32 L. ed. 346, 350, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Coe v. Errol*, 116 U. S. 517, 528, 29 L. ed. 715, 719, 6 Sup. Ct. Rep. 475."

And in the second *Coronado Coal* case,* where it was held, upon a retrial, that a restraint had been made out, the holding was based, not upon the proposition that mining or manufacturing is interstate commerce in and of itself, but that an actual intention to diminish the supply of coal available for shipment in interstate commerce had been made out; quite a different matter, and an element wholly lacking here. See discussion in *Apex Hosiery Co. v. Leader*, 310 U. S. 469 at pp. 511-12.

To put it in a nutshell, apposite decisions of this court reveal that interstate commerce as such in cases of this type is precisely what it was held to be in cases such as *Arkadelphia Co. v. St. Louis S. W. Ry. Co.*, 249 U. S. 134, 151-2, where this court said:

"Upon the facts as stated, it is our opinion that the district court erred in treating the movement of the rough lumber from the woods to the milling point as interstate commerce. It is not merely that there was no continuous movement from the forest to the points without the State, but that when the rough material left the woods it was not intended that it should be transported out of the State, or elsewhere beyond the mill, until it had been subjected to a manufacturing process that materially changed its character, utility, and value. The raw material came to rest at the mill, and after the product was manufactured it remained stored there for an indefinite period—manufacture and storage occupying five months on the average—for the purpose of finding a market. Where it would eventually be sold no one knew. And the fact that previous experience indicated that 95 per cent. of it must be marketed out-

**United Mine Workers v. Coronado Coal Co.*, 268 U. S. 310.

side of the State, so that this entered into the purpose of the parties when shipping the rough material to the mill, did not alter the character of the latter movement. The question is too well settled by previous decisions to require discussion."

The foregoing principles are, of course, fully applicable to the manufacture of sugar from sugar beets, and two Federal Court decisions squarely so hold. Both in *United States v. Great Western Sugar Co.*, D. C. Neb., 39 F. (2d) 149 (a Sherman Act case) and in *Utah-Idaho Sugar Co. v. Federal Trade Commission*, 8 Cir., 22 F. (2d) 122, 125-6, it was held that the manufacture of beets into sugar is not interstate commerce, and that there was no commerce to be obstructed until the beets had been manufactured into sugar and the sugar placed in transport.

It is also appropriate to point out at this juncture that the Alabama case of *Dothan Oil Mill Co. v. Espy*, 220 Ala. 605, 127 So. 178, which is the closest case to ours we have been able to find on the facts, holds fully in accord with our contentions here. In that case the plaintiffs were engaged in the business of ginning cotton and selling the cotton seed to defendants, who crushed the seed and manufactured therefrom cotton seed oil, some of which was shipped in interstate commerce. Defendants were alleged to have conspired to fix the price to be paid for cotton seed at all points in Alabama, such price being embodied in a uniform sales contract form prepared by the defendants, which plaintiffs alleged they were compelled to sign since defendants were the only buyers in Alabama of any appreciable amount of cotton seed. On appeal from an order overruling defendants' demurrers to plaintiffs' bill to enjoin the above mentioned practice,

the demurrers being interposed partly on the ground that only the federal district court had jurisdiction to grant the relief prayed for, it was held that the order be affirmed. At pages 182-183 the Supreme Court of Alabama said:

"We are not of opinion, however, that the business of buying cotton seed, confined wholly to the state, to be crushed and manufactured into oil and other products, in such state, constitutes interstate commerce, within the scope and purpose of said act or within the sense of the Sherman and Clayton Acts (15 U. S. C. A. §§1-7, 15, and sections 12-27, 44) which confer on the federal courts exclusive jurisdiction to enforce said acts, though some of the manufactured products may eventually find their way into and become commodities of interstate commerce. 'The fact, of itself, that an article when in the process of manufacture is intended for export to another state does not render it an article of interstate commerce,' Crescent Cotton Oil Co. v. State of Mississippi, 257 U. S. 129, 42 S. Ct. 42, 44, 66 L. Ed. 166; Coe v. Errol, 116 U. S. 517, 6 S. Ct. 475, 29 L. Ed. 715; New York Central R. R. Co. v. Mohney, 252 U. S. 152, 40 S. Ct. 287, 64 L. Ed. 502, 9 A. L. R. 496.

Though, under the provisions of section 26, tit. 15, of the United States Code Annotated, a private individual may maintain a suit to enjoin acts interfering with interstate commerce, in a proper case, the acts complained of must be immediately and directly against such commerce. *Gable v. Vonnegut Mach. Co. et al. (C. G. A.), 274 F. 66; Anderson v. Shipowners' Association of Pacific Coast, 272 U. S. 359, 47 S. Ct. 125, 71 L. Ed. 298.*

These observations are sufficient to justify a denial of appellants' contention that, on the case made by the bill, the Federal District Court, only, has jurisdiction to grant the relief prayed. *Home Telephone Co. v. Michigan R. R. Commission*, 174 Mich. 219, 140 N. W. 496."

The court then went on to hold that the defendants were amenable to the *state* anti-trust law.*

Petitioners attempt to avoid the effect of the decisions which we cite on the ground that *some* of them stem from the tax case of *Coe v. Errol*, 116 U. S. 517; and they say that since the *Coe* case was cited in *Carter v. Carter Coal Co.*, 298 U. S. 238 and since *that* case in turn was limited, if not overruled by subsequent cases, including *U. S. v. Darby*, which we have cited above, our contentions as to what interstate commerce is must be wrong.

With all respect, this does not follow at all. *U. S. v. Darby*, for instance, 312 U. S. at p. 122, squarely holds that the "Sherman and the National Labor Relations Act are familiar examples of the exertion of the commerce power to prohibit or control activities *wholly intrastate* because of their effect *on* interstate commerce." *This language is wholly in accord with our contentions here.* We have reiterated again and again that the pivotal question in this case is whether or not the activities complained of had the effect on interstate commerce which the Sherman Act forbids. But the *Darby* case itself concedes, as we have seen, that manufacture is not interstate commerce; which is our present point.

*It is not amiss to point out that California, also, has an anti-trust law. Cal. Stats. 1907, ch. 530 as amended; codified 1937 as Business and Professions Code §§16700-16758; see also *Speagle v. Board of Fire Underwriters*, 29 Adv. Cal. 27.

It is also said that in enacting the Sherman Act Congress exercised all of the power which it possessed. But, as pointed out in *Apex Hosiery Co. v. Leader*, 310 U. S. 469 and particularly at pp. 495, 500-501, it was in the sense of preventing restraints on commercial competition with reference to articles or commodities passing in interstate commerce that Congress exercised "all the power it possessed."

Petitioners also argue, of course, that the intrastate activities complained of may not be "insulated" from the operation of the Sherman Act. This point, however, is foreign to the point provoked by them and now under discussion; namely, what is interstate commerce so far as processed products of the farm is concerned? It follows that the question of insulation from the operation of the Act may be more properly dealt with when we come to consider whether or not the activities complained of had any substantial economic effect or any effect upon interstate commerce; a question to which we now turn.

2. *The Amended Complaint Affirmatively Discloses That the Activities Complained of Had No Effect Whatever Upon Interstate Commerce, Let Alone the Substantial Economic Effect Condemned by the Sherman Act.*

Nowhere has our position been better stated than in the opinion in *Apex Hosiery Co. v. Leader*, 310 U. S. 469, 500-501, where the Court, speaking through Mr. Justice Stone, said:

"In the cases considered by this court since the Standard Oil Co. case in 1911 some form of restraint of commercial competition has been the *sine*

qua non to the condemnation of contracts, combinations or conspiracies under the Sherman Act, and in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price. It is in this sense that it is said that the restraints, actual or intended, prohibited by the Sherman Act are only those which are so substantial as to affect market prices. Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition. Board of Trade v. United States, 256 U. S. 231, 238; 62 L. Ed. 683, 687, 38 S. Ct. 242, Ann. Cas. 1918D 1207; United States v. United States Steel Corp., 251 U. S. 417, 64 L. Ed. 343, 40 S. Ct. 293, 8 A. L. R. 1121; Cement Mfrs. Protective Asso. v. United States, 268 U. S. 588, 69 L. Ed. 1104, 45 S. Ct. 586; United States v. International Harvester Co., 274 U. S. 693, 71 L. Ed. 1302, 47 S. Ct. 748; Appalachian Coals v. United States, 288 U. S. 344, 375 *et seq.*, 77 L. Ed. 825, 837, 53 S. Ct. 471."

This Court thus plainly held that in order to constitute a substantial economic effect upon interstate commerce there must be a restraint (a) upon a commodity moving in interstate commerce which (b) affects its market price or (c) otherwise adversely affects purchasers or consumers of such commodity.

The application of these principles to the case at bar is purely a matter of appraising the facts alleged. We know that the beets did not move, nor were they ever

intended to move, in interstate commerce. We likewise know that petitioners have actually disclaimed any restraint as to the *sugar*, the product which *did* move in interstate commerce; nor has it ever been claimed that either the price or the supply of the sugar was ever affected or that the purchasers or consumers of the sugar were deprived of any advantage whatever. The result is that the amended complaint, as held by both courts below, wholly failed to show a violation of the Sherman Act under the very tests laid down by this Court; and not a single authority cited by petitioners even hints to the contrary.

It thus follows that this cannot properly be said to be a situation where intrastate activities are sought to be "insulated" from the operation of the Act. This is a case where the Act simply has no application for the simple reason that interstate commerce was not affected at all. The *Frankfort Distilleries* case, 324 U. S. 293, is perhaps the leading decision which comes to mind when the word "insulation" is mentioned. But there the restraint directly affected the price of the very commodities which had passed in interstate commerce; the precise situation envisaged in the *Apex Hosiery* case.

The same considerations would apply, of course, as to restraints sought to be imposed upon commodities entering the stream of interstate commerce. The second *Coronado Coal Co.* case is, as we have seen, direct authority for the proposition that intrastate activities will not be "insulated" from the operation of the Act where they are aimed at affecting the price or supply of the interstate commodity *after* it has started its journey. But again, this is not such a case. Petitioners neither allege nor claim that the *sugar*—the interstate commodity here

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involved—was affected in the least by the activities of which they complain. For this reason none of the Sherman Act cases which they cite are of assistance here because without material exception they dealt with such a situation as we would have here if the price of the sugar had been fixed at destination; that is to say, if the price of the very commodity passing through interstate channels had been fixed by agreement. *But this is not and never has been such a case.*

We now turn to the failure of the amended complaint to show any adverse effect upon the public interest; an element which, as we have seen, is an essential in any attempt by a private party to recover under the Sherman Act.

B. The Amended Complaint Failed to State a Claim Because It Affirmatively Appears Therefrom That the Activities Complained of Did Not Result in Any Violation of or Injury to the Public Rights Which It Is the Purpose of the Sherman Act to Protect.

It is not open to dispute that the purpose of the Sherman Act is to protect the public from monopolies and restraints of trade with reference to commodities passing in interstate commerce; and that the individual right of action conferred by 15 U. S. C. §15 is wholly incidental to this fundamental purpose. Thus a complaint in such a case must show "not only damages sustained by the individual plaintiff but even more importantly a violation of public rights prohibited by the Act." *Wilder Mfg. Co. v. Corn Products Co.*, *supra*, 236 U. S. 165, 174.

Petitioners made no showing whatever with reference to this important element of their cause of action. There

was no consuming public so far as the beets were concerned. The only segment of the public which could have been involved under the facts of this case would have been the purchasers or consumers of the sugar, for this was the only commodity which reached the public, either through the channels of interstate commerce or otherwise. True, the amended complaint attempts to set up damage so far as the individual petitioners are concerned; but it utterly fails to allege one single fact which would show that the rights of the *public* were in any way affected. It follows that the complaint was therefore necessarily deficient in this regard for the same reasons that we have discussed above; since the activities complained of did not have *any* effect upon interstate commerce, they likewise failed to have any effect upon the public right protected by the Act; namely, the right to free and open markets in interstate commerce.

As to this, petitioners assert that price-fixing is unlawful *per se* under the Sherman Act. This, of course is true only where interstate commerce is adversely affected; and as we have seen, this is not such a case.

It is next said that the American public is "interested" in preserving competition among the buyers of sugar beets. This would be true in the sense under discussion only if the beets had passed in interstate commerce (which they did not) and had been bought by the public (which they were not) or, if, in the alternative, the lack of competition complained of had been reflected in the prices of

the sugar which the public *did* buy (which, again, it was not).

The plain fact is that petitioners cannot even show a uniformity of interest as to the very group to which they belong, namely, the beet growers of northern California.—As the District Judge so plainly pointed out, since they claim damage because of an *averaging* of the net return to the processors, it is not open to dispute that while the petitioners may have suffered a detriment, the growers who delivered their beets to the other processors mentioned in the amended complaint necessarily received a compensating advantage. [R. 102.] Petitioners, despite their present protestations to the contrary, obviously admit this when they concede that respondent's payments for beets before 1939 and after 1941, made on the basis of its *own* net returns, *were* competitive [R. 77, Amd. Comp., par. X], a fact which, in turn, also effectually and in any event minimizes their claim of public interest, since the practices complained of ceased some six years ago. The public is not interested in stale private claims.

Conclusion.

We shall not take the time nor the space to discuss in detail the authorities cited by petitioners in support of their contentions. Where a question such as the present is concerned, it is always possible to pick up isolated quotations from random cases which will support any thesis. We have endeavored to set out, as we understand them, the guiding principles which are applicable to such

a case as this; and it seems to us that they all sum up to the basic question first mentioned by us: Did or did not the activities complained of have that substantial economic effect upon interstate commerce which the Sherman Act proscribes. And it is respectfully urged that this question should surely be answered in the negative.

Respectfully submitted,

LOUIS W. MYERS,
PIERCE WORKS,

Attorneys for Respondent.

O'MELVENY & MYERS,
JOHN WHYTE,
Of Counsel.

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CHARLES ELMORE CROPLEY
CLERK

IN THE
Supreme Court of the United States

October Term, 1947

No. 75

MANDEVILLE ISLAND FARMS, INC., a corporation, and
ROSCOE C. ZUCKERMAN,

Petitioners,

vs. v

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,

Respondent.

PETITION FOR REHEARING.

LOUIS W. MYERS,

PIERCE WORKS,

900 Title Insurance Building, Los Angeles 13,

Attorneys for Respondent.

O'MELVENY & MYERS,

JOHN WHYTE,

Of Counsel.

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IN THE
Supreme Court of the United States

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No. 75

MANDEVILLE ISLAND FARMS, INC., a corporation, and
ROSCOE C. ZUCKERMAN,

Petitioners,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,

Respondent.

PETITION FOR REHEARING.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Respondent respectfully petitions for a rehearing of this cause upon the following grounds:

1. The Court has failed to decide the case presented to it;
2. The Court has decided the case upon assumptions of fact which are non-existent and which were disclaimed by petitioners both in the courts below and in this Court itself.

The case presented to the lower courts and to this Court was whether or not, absent any effect upon the price of the processed interstate commodity (sugar), an

alleged combination to fix the price of a locally grown and processed farm product (sugar beets) violates the Sherman Act. This question, which was the question decided in the negative by both the District Court and the Circuit Court of Appeals, has not been decided by this Court.

What has been decided by this Court is, with all deference, that both respondent and the District Court have been entrapped by a stipulation entered into for the express purpose of permitting petitioners to have an inexpensive appeal in order to test the question posed above. And the record clearly bears this out.

The original complaint charged that the refiners, regardless of the price at which *sugar* was sold from any particular refinery, paid the growers the same price for their beets of equivalent sugar content. [R. 11.] At the same time the same paragraph (XI) charged a conspiracy to restrain interstate commerce in *sugar and sugar beets*. [R. 10.] This was the ambiguity which the Court mentions at pages 24-25 of the slip opinion when it says:

"With no further support from the record, it has been assumed that the ambiguity so elided was the reference to restraint of trade in *sugar* and hence the petitioners in making it stated themselves out of Court."

There is, however, further support from the record. The stipulation itself (Slip Opinion, dissent, p. 2) recites that the District Judge suggested that the contracts be attached to the amended complaint and that, if that were done, the Sherman Act count would not, in his judgment, state a cause of action. Why not? Because, obviously, the contracts revealed that the beets alone were the subject of the pricing formula and the formula itself re-

vealed that the beet price was not a factor in the sugar price, but that the exact reverse was the case. A recourse to the opinion of the District Judge [R. 100-108] amply reflects his understanding in this regard. *Possible restraint as to the sugar was not even discussed therein.*

Nor is this all. In this very Court, at the oral argument, counsel for petitioners *conceded* that the purpose of the stipulation was to eliminate any charge that the alleged conspiracy affected the price of the sugar:

"Justice Jackson: If it did not restrain commerce in sugar or sugar beets, in what did it restrain commerce?

● Mr. Arndt: The only reason those words were taken out was this: The District Judge thought that by the use of the word 'sugar' there we were alleging that the price of sugar to the ultimate consumer was—

Justice Jackson: Affected?

— Mr. Arndt: —was affected, and we told the court that *we had no intention of so alleging and did not so allege*, but the District Judge said 'With those words "sugar" and "sugar beets" in there it may be construed that way.'

So to avoid any question that we were not claiming that the price of beets, of sugar, to the ultimate consumer was affected, only the price paid the producer, those words were taken out." [Ward & Paul, Tr. pp. 16-17.]

As emphasizing this situation, the following colloquy is also of interest:

"Justice Frankfurter: Is it a fact that the price of beets was determined by what price the refiner would get in the market for his sugar?

Mr. Arndt: Yes.

Justice Frankfurter: That is a fact?

Mr. Arndt: That is a fact.

Justice Frankfurter: And the cost to them wasn't predetermined by what they had to pay for your beets; is that right? The sale price there, they didn't have to take beet sugar at a price which was fixed by this agreement, did they?

Mr. Arndt: That is correct, *because there was no fixed price; it was a formula price, it worked backwards.* [Ibid., p. 67.]

These concessions it is submitted, undermine the very foundations of the majority opinion. It cannot be said, as the opinion does say (p. 25), that the ambiguity "arose from the reference to interstate trade in beets." Nor can it be said, as the opinion does intimate in various places, that the conspiracy affected the *quantity* of sugar interstate commerce. Quantity, or supply, is obviously an inseparable factor of *price*. Hence, when it is conceded that the price to the ultimate consumer was not affected, it is implicit in the concession that the same was true of supply. *And the amended complaint is wholly barren of any allegation even remotely to the contrary.*

Beyond all this, petitioners have never claimed and they do not claim now that the ultimate consumer of the interstate product was affected one iota by the combination alleged. It was for this reason that we have maintained throughout this case that the combination alleged had no substantial effect upon interstate commerce. And in making that contention, we have not followed, as the opinion seems to imply, the pattern of such early cases as *United States v. E. C. Knight Co.*, 156 U. S. 1. On the contrary,

we have followed the pattern of *Wickard v. Filburn*, 317 U. S. 111, with its holding that the proper standard is whether or not a substantial economic effect has been exerted upon interstate commerce; the pattern suggested in *Apex Hosiery Co. v. Leader*, 310 U. S. 469: ("Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce are not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition"); and last, but not least, the fact, *conceded in United States v. Darby*, 312 U. S. 400, that manufacture, as such, is not commerce.

It is true, of course, that in *this* Court petitioners took the anomalous position that, although they made no claim that the price of sugar to the ultimate consumer was affected, interstate commerce in sugar was restrained because, it is said, their complaint "specifically alleged that they (the refiners) no longer competed as to the efficiency of sales or manufacturing organizations of themselves and that *regardless of the efficiency or lack of efficiency of the sales or manufacturing organizations*, they paid all the growers within this district the same amount based upon the same fixed formula." [Tr. p. 8.] And the opinion, with all respect, stresses these atmospheric allegations as bringing sugar back into the case *after the petitioners had taken it out*.

The opinion of the District Judge faithfully reflects the fact that no such contention was made in the court below. And we think it only proper to call to the attention of the Court that, it having been conceded that the price of sugar

remained unaffected, the only effect of such allegations, wherever they appear, is to charge that due to assertedly increased expense, respondent's *net returns* were allegedly decreased, *without affecting the price to the consumer at all*. This, were petitioners able to prove it, might be material on the issue of damages alone, viewed in the abstract. But we submit that the question of whether respondent's operating expenses went up or down was not of the slightest concern so long as these factors were not reflected in the price to the interstate consumers; and *petitioners concede that it was not*.

We also believe it proper to point out that the allegations which the Court has deemed sufficient to keep sugar in the case were all conclusions of the pleader* Compare *Glenn Coal Co. v. Dickinson Fuel Co.*, 4 Cir., 72 F. (2d) 885, 887. They were directly attacked as such by motion addressed to the original complaint. [R. 32, 34-35, specifications 8(a)18(d).] After the reference to the sugar was deleted from the charging paragraph, the motion for a more definite statement was not renewed because, while the allegations to the same effect in the amended complaint still constituted mere conclusions of the pleader, they were meaningless as well as erroneous when applied to the beets alone; a proposition with which the Court apparently agrees since it seems to concur (Op. p. 26) in *petitioners'* contention that the only interstate trade was in sugar.

We concede, of course, that our motion to dismiss admitted, for the purposes of the motion, all of the well-

*See, for instance, the allegation set forth in note 6, at page 6 of the opinion, which is correctly characterized as summarizing *petitioners' conclusions*.

pleaded *facts* set forth in the amended complaint. *But it did nothing more.* It did not admit conclusions of the pleader nor did it admit conclusions of law.

It is urged with all deference that, for the reasons given above, the decision of the Court is based upon factual assumptions and conclusions which were and are utterly foreign to those admitted by the motion below or considered by the District Judge in passing upon the motion; and that a decision which rests upon assumed facts which do not exist, and the nonexistence of which is established by the record, is undeniably a miscarriage of justice; wherefore, respondent prays that a rehearing be granted in order that the Court may reconsider the matter, and that pending such rehearing the mandate of the Court may, by appropriate order, be stayed.

Respectfully submitted,

(Sgd.) LOUIS W. MYERS,

(Sgd.) PIERCE WORKS,

Attorneys for Respondent.

O'MELVENY & MYERS,

JOHN WHYTE,

Of Counsel.

Certificate of Counsel.

I, Pierce Works, do hereby certify that I am one of the attorneys for respondent herein and that the foregoing petition is presented in good faith and not for delay.

(Sgd.) PIERCE WORKS.

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CHARLES ELMORE CROPLEY
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IN THE
Supreme Court of the United States

October Term, 1947

No. 75

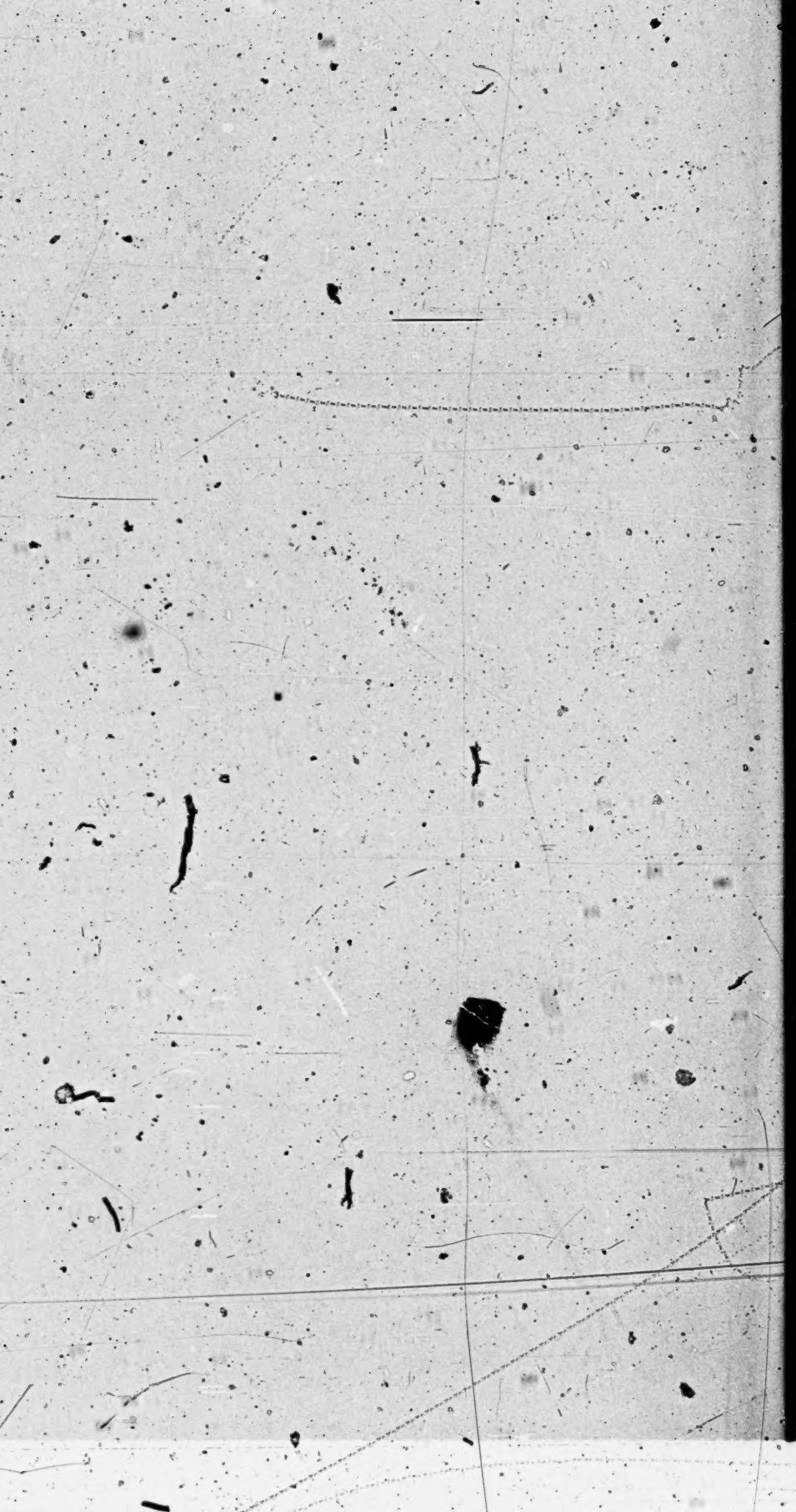
MANDEVILLE ISLAND FARMS, INC., a corporation, and
ROSCOE C. ZUCKERMAN,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,

RESPONSE TO PETITION FOR REHEARING.

GUY RICHARD CRUMP,
STANLEY MORRIS ARNDT,
458 South Spring Street, Los Angeles 13,
Attorneys for Mandeville Island Farms, Inc.,
and Roscoe C. Zuckerman.



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IN THE
Supreme Court of the United States

October Term, 1947

No. 75

MANDEVILLE ISLAND FARMS, INC., a corporation, and
ROSCOE C. ZUCKERMAN,

vs.

AMERICAN CRYSTAL SUGAR COMPANY, a corporation,

RESPONSE TO PETITION FOR REHEARING.

*To the Honorable Chief Justice and the Associate Justices
of the Supreme Court of the United States:*

This Court has held that under the allegations of the amended complaint; defendant Sugar Company has been guilty of violating the Sherman Act. The Sugar Company has applied for a rehearing. Its application is not based upon the merits but upon an alleged disavowal or waiver by plaintiffs of their cause of action. The defendant Sugar Company in effect admits it has violated the Sherman Act under the allegations of the complaint; but seeks to avoid responsibility to the parties it has wronged by claiming that such parties waived their rights by a stipulation entered into below. This is based upon what was supposed to have occurred before the trial Judge, when that Judge "stated from the bench to counsel herein that he felt that the first cause of action, if supplemented

by copies of the contracts attached to the defendant's motion to dismiss, would not state facts sufficient to constitute a cause of action, and suggested that it would be a tremendous saving of time and expense if the complaint were amended." [Tr. p. 65.]

Defendant Sugar Company, in applying for a rehearing, does not produce, and it has at no time produced the record of what actually transpired before the trial court, but *makes its entire argument upon assumptions as to the record that are untrue and completely contrary to the record.*

In order to avoid any further misunderstanding, we have had the proceedings written up by the official reporter of the District Court. Attached hereto as a supplement is a copy of Reporter's Transcript of those proceedings certified to as correct by the reporter.

This clearly shows that, not only was there no waiver or disavowal, but that *the trial court specifically assured the plaintiffs' attorney that he was not being asked to abandon anything.* It further shows that the words were eliminated because both the trial court and the attorney for the Sugar Company thought that they were susceptible of being construed as alleging *that the sugar beets themselves were transferred across State lines.*

We quote from the Reporter's Transcript, page 3 *et seq.* (emphasis added):

"The Court: But regardless of what I think, we should look at this case from a practical point of view. What is best for the parties?"

* * * * *

I want to say frankly, gentlemen, as I understand the claim of the plaintiffs that by reason of the grow-

ing. of beets and agreeing to sell them to the refinery, brings the case within the purview of the Anti-Trust Act.

The pleadings here use some very broad language. *They speak of the transportation of beets and sugar in interstate commerce.*

I assume the evidence will show that beets were sold to the sugar refinery and were processed and the sugar then entered into interstate commerce.

Mr. Arndt: *I don't think we allege the beets themselves were in interstate commerce.*

Mr. Whyte: *Yes, you do. I assumed there was an oversight.*

The Court: *There is some language with reference to sugar and sugar beets in the complaint. I believe it is on page 7:*

** * * unlawfully monopolize and restrain trade and commerce in sugar and sugar beets among the several states * * **

Mr. Arndt: *We do not allege, your Honor, that the beets themselves were physically transported. It is our contention that under the decisions the entire situation was interstate commerce. We do not claim that there was a physical transportation of the beets over state lines.*

The Court: *I feel, however, that that allegation precludes the court from making a ruling.*

I felt that if this complaint could be made clear in that respect and the contracts pleaded that a ruling would enable counsel to appeal the case without too much cost.

I want to say frankly that I feel this is not an interstate commerce case. I have spent some two

weeks studying it and I have a number of my own authorities. I have examined those authorities and I feel if this first cause of action could be ruled on with the contracts and the pleadings in proper shape, that it would be an inexpensive matter to appeal and determine whether or not I am wrong.

On the other hand, if the case should be tried it would be a very expensive matter."

The trial court [commencing at Rep. Tr. p. 6], stated:

"It seems there is no end of reading when you start examining these various cases, but I haven't found anything that makes me feel that an agricultural product enters into interstate commerce by reason of being delivered to a processor that is engaged in interstate commerce and who processes that particular agricultural commodity." * * *

"Now, the contracts or portions of the contracts are pleaded in your motion to dismiss. You set them forth and indicate that I could use those contracts in passing upon this motion.

Mr. Whyte: I wasn't sure, your Honor. Those authorities did give some indication of it.

The Court: But they weren't very convincing to me and I felt I should let counsel take their choice on that—that is, if you wanted to build up an expensive record in view of the court's attitude in the matter or wanted to get this thing in shape so it would be squarely before the reviewing court on the pleadings. In other words, I do not want to cause you unnecessary expense."

On page 16 of the Reporter's Transcript, the following occurred:

"The Court: Let me ask this question as a matter of general information. These beets are processed in

the refineries and following that is the sugar immediately put on the market?

Mr. Whyte: There is some lag, I suppose, according to supply and demand.

Mr. Arndt: In some years it is immediately sold and some years there is a carry-over. Right now there is a shortage and it is sold immediately.

In 1939, '40 and '41 there was an overproduction and it was not immediately sold. It is as counsel says, a question of supply and demand whether sold immediately or not sold immediately. *As a matter of fact, I think the cause of our present lack of supply of sugar is due to these contracts.*"

On page 19 the following occurred:

"The Court: Well, I have read your cases, counsel, and I have probably given more time to this case, particularly on a motion to dismiss, than I have on any other case for a long time.

In the first place it was a new subject to me and it was interesting. There is such a thing as convincing myself to the contrary, but at this time I am convinced that these beet growers are not entitled to protection under the Anti-Trust Act. I may be wrong. It won't be the first time I have been wrong, and it will probably not be the last time either. But I do feel that the pleadings without pleading the contracts and with this particular language in there, makes it difficult to dismiss in view of the general language used and the liberality of pleadings under the Federal Rules of Civil Procedure.

Mr. Whyte: Doesn't your Honor have discretion to grant the motion with leave to amend?

The Court: I have had this rather frank, informal discussion with counsel to let them know what I have been thinking. I don't know how you gentlemen

could approach the subject other than for me to sit here and listen. *I was in hopes that counsel would see fit to amend the first cause of action so that we could get a definite ruling because if we try it and then I should rule as I do now you would be unable to prove that the beets went into interstate commerce and after going through all those preliminary steps and building up a record I don't know whether you would be any better off or not.*

Mr. Arndt: Then how is it procedurally possible? Suppose I do amend and set forth the contracts? How is it procedurally possible to have an appeal without a trial? I am not going to abandon my second count.

The Court: *I am not asking you to abandon anything. I want you to understand I am only trying to be helpful. I want to try to decide this case correctly. At the same time I feel that if these matters could be reached and have a ruling on this question that it would save you both money because if the court rules with you on this first cause of action then the law of the case is going to be established and it would be settled. On the other hand, if we try it and build up a record and the court reverses it and sends it back for retrial, you would have to go through the same thing again" [p. 21].*

After reading this record it is patent that there was no waiver or disavowal on the part of the plaintiffs nor any intent to disavow anything except to state that the sugar beets themselves did not physically cross the State line. The Trial Judge specifically stated that he was not asking plaintiffs to abandon anything and yet defendant insists that plaintiffs abandoned their entire cause of action by entering into the stipulation that the District Judge urged! The memory of counsel for defendant Sugar Company

and the memory of counsel for plaintiff were faulty at the time of the oral argument but the record now speaks for itself.

In view of this record, it is impossible to understand the statement made by defendant Sugar Company on page 2 of its Petition with reference to the Sugar Company and the District Court having been "entrapped" by a stipulation. It was the District Judge who thought that the inclusion of the words "sugar and sugar beets" in paragraph XI of the original complaint was susceptible of being construed as alleging that the sugar beets crossed the State line. It was Mr. Whyte, one of the attorneys for the Sugar Company, who insisted that such was his interpretation of the words. If anybody was entrapped it was the plaintiffs, the victim of the conspiracy. They acceded to the urgings of the trial Court and amended their complaint only after being assured by that Court that they were not being asked to abandon anything. They now find that defendant claims that by so doing they have abandoned all of their rights herein!

It is perhaps significant that the point now relied upon by defendant was not raised by it in the Circuit Court of Appeals, nor was it raised in the answer to the petition for certiorari herein, but was raised for the first time in its brief filed a few days before the oral argument, too late for plaintiff to have the record written up.

We feel that if the record had been written up and had been presented to the Court at the time of the oral argument, the two Justices here who dissented would not have dissented.

Paragraph XIX of the amended complaint specifically states:

"By reason of the foregoing acts of the defendant and its said conspirators, *interstate commerce in sugar was illegally restrained, competition therein was not only substantially lessened but was destroyed, the price of sugar beets was illegally fixed, and an illegal monopoly was established*, all in violation of the anti-trust laws of the United States, to the damage of plaintiffs as aforesaid." (Emphasis added.)

Defendant Sugar Company brushes that aside by contending that it is a mere conclusion of the pleader. If that be a mere conclusion of the pleader, then a like allegation contained in paragraph XI of the original complaint is a conclusion of the pleader—but defendant Sugar Company does not so contend. It contends that the allegations of said paragraph XI are so vital, important and material that striking out the words "sugar and sugar beets" therein was a waiver, disavowal and abandonment of plaintiffs' cause of action, while the inclusion of like allegations in paragraph XIX of the amended complaint was a mere conclusion of the pleader! Such inconsistency shows the utter lack of merit in defendant's contention.

Defendant Sugar Company, on the record, is guilty of violation of the Sherman Act. It is endeavoring to squirm out of that liability by ignoring the record and imagining a waiver that never took place. The plaintiff farmers, victims of the alleged conspiracy, had no intention to disavow or waive their causes of action herein and they

did not do so. They stipulated only after having been assured by the Trial Judge that they were not abandoning anything. To hold that they did abandon their cause of action by acceding to the District Court's urging would indeed be an "entrapment," but it would not be justice.

Plaintiffs respectfully urge that the petition for rehearing be denied.

Respectfully submitted,

GUY RICHARD CRUMP,

STANLEY MORRIS ARNDT,

*Attorneys for Mandeville Island Farms, Inc.,
and Roscoe C. Zuckerman.*

Certificate of Counsel.

I, Stanley Morris Arndt, do hereby certify that I am one of the attorneys for Mandeville Island Farms, Inc., and Roscoe C. Zuckerman; that the foregoing response is presented in good faith and not for delay.

STANLEY MORRIS ARNDT.

SUPPLEMENT

SUPPLEMENT.

In the District Court of the United States for the Southern District of California, Central Division.

Honorable Ben Harrison, Judge Presiding.

Mandeville Island Farms, Inc., a corporation, and Roscoe C. Zuckerman, Plaintiffs, vs. American Crystal Sugar Company, a corporation, Defendant. No. 4643-BH-Civil.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Tuesday, November 13, 1945

Appearances:

For the Plaintiffs: Messrs. Wood, Crump, Rogers & Arndt, By Stanley Arndt, Esquire.

For the Defendant: O'Melveny & Myers, and Pierce Works, and John Whyte, Esquire, By John Whyte, Esquire.

[Rep. Tr. p. 2, lines 1 to 25]:

Los Angeles, California, Tuesday, November 13, 1945
10:00 A. M.

The Court: You may proceed.

The Clerk: 4643-BH, Civil, Mandeville Island Farms and others versus American Crystal Sugar Company.

Motion of defendant to dismiss or in the alternative to strike from the complaint, or for a more definite statement or for a bill of particulars, pursuant to notice, motion, and points and authorities.

Mr. Arndt: The plaintiff is ready.

Mr. Whyte: The defendant is ready.

The Court: You may proceed.

Mr. Whyte: If the court please, this is a motion to dismiss, or in the alternative to strike from the complaint—

The Court: I have read the pleadings and have spent about two weeks studying this matter. I will not need a statement as to what is contained in your pleadings.

Mr. Whyte: I assume your Honor has read our points and authorities. I don't know how Mr. Arndt feels about it, but our position is set forth in our points and authorities and are just as I would present them to your Honor orally.

The Court: I would like a discussion with you gentlemen as to several points that I have in mind.

As I read the pleadings generally, they cover really two points. There are two points involved. One concerns [Rep. Tr. p. 3, lines 1 to 25]:

itself with the Anti-Trust Act and secondly there is an accounting question. And it seems that those two questions are split up into four causes of action.

One question I have in mind is whether your first cause of action, in using the language that you do, it might be subject to what in State practice would be called a general demurrer.

But regardless of that I think we should look at this case from a practical point of view. What is best for the parties?

It is quite apparent to me from a reading of the pleadings that the question is whether a beet grower who enters into an agreement with a sugar refinery whereby the sugar refinery agrees to pay the current price for beets is a basis for the payment of beets by the other refineries in this particular area. The area is described as being north of the 36th parallel.

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I want to say frankly, gentlemen, as I understand the claim of the plaintiff that by reason of the growing of beets and agreeing to sell them to the refinery, brings the case within the purview of the Anti-Trust Act.

The pleadings here use some very broad language. They speak of the transportation of beets and sugar in interstate commerce.

I assume the evidence will show that beets were sold [Rep. Tr. p. 4, lines 1 to 25]:

to the sugar refinery and were processed and the sugar then entered into interstate commerce.

Mr. Arndt: I don't think we allege the beets themselves were in interstate commerce.

Mr. Whyte: Yes, you do. I assumed that was an oversight.

The Court: There is some language with reference to sugar and sugar beets in the complaint. I believe it is on page 7:

"* * * unlawfully monopolize and restrain trade and commerce in sugar and sugar beets among the several states * * *"

Mr. Arndt: We do not allege, your Honor, that the beets themselves were physically transported. It is our contention that under the decisions the entire situation was interstate commerce. We do not claim that there was a physical transportation of the beets over state lines.

The Court: I feel, however, that that allegation precludes the court from making a ruling.

I feel that if this complaint could be made clear in that respect and the contracts pleaded that a ruling would enable counsel to appeal the case without too much cost.

I want to say frankly that I feel this is not an interstate commerce case. I have spent some two weeks

[Rep. Tr. p. 5, lines 1 to 25]:

studying it and I have a number of my own authorities. I have examined those authorities and I feel if this first cause of action could be ruled on with the contracts and the pleadings in proper shape, that it would be an inexpensive matter to appeal and determine whether or not I am wrong.

On the other hand, if the case should be tried it would be a very expensive matter.

You cited the Apex Hosiery Company vs. Leader, 310 U. S., page 502. I think you will find that page 512 contains must stronger language. But neither of you have cited the case of Parker vs. Brown, 317 U. S., page 341, which went up from this district. While it is not an anti-trust case it involved the question of whether or not raisins before entering into interstate commerce were to be classified as coming within the purview of the Interstate Commerce Act.

Of course that involved a state regulation. That case was tried by a three-judge court and a decision was had with Judge Yankwich dissenting and the Supreme Court agreed with Judge Yankwich in that case.

In reading these cases they almost create a state of confusion because where state regulations are concerned the courts are not inclined to assume jurisdiction but yet in anti-trust cases they are. There is one case that is probably not controlling but it is persuasive, and that is [Rep. Tr. p. 6, lines 1 to 25]:

an Alabama case in 127 Southern. I feel very strongly that as a trial court it is not my function to expand upon the meaning of interstate commerce. I think that is a problem for the appellate court and really the Supreme Court.

It seems there is no end of reading when you start examining these various cases, but I haven't found anything that makes me feel that an agricultural product enters into interstate commerce by reason of being delivered to a processor that is engaged in interstate commerce and who processes that particular agricultural commodity. I can understand the differentiation in wheat cases, where the wheat simply is purchased in interstate commerce and moves in its present form. It was, however, rather hard for me to understand the raisin case because raisins are delivered to the processor who finally enters them into the stream of interstate commerce. They don't change their form any. But here we have sugar beets that are completely changed. Only a very small percentage of the beet eventually enters into and becomes sugar. I believe in this particular case it is between 16 and 17 per cent.

Now, the contracts or portions of the contracts are pleaded in your motion to dismiss. You set them forth and indicate that I could use those contracts in passing upon this motion.

Mr. Whyte: I wasn't sure, your Honor. Those authorities did give some indication of it.

[Rep. Tr. p. 7, lines 1 to 25]:

The Court: But they weren't very convincing to me and I felt I should let counsel take their choice on that—that is, if you wanted to build up an expensive record in view of the court's attitude in the matter or wanted to get this thing in shape so it would be squarely before the reviewing court on the pleadings. In other words, I do not want to cause you unnecessary expense.

And there is another question that has occurred to me. Why aren't these growers co-conspirators also? They

entered into a contract and the terms of the contract are clear. They agreed to all these things. Why aren't they co-conspirators?

Mr. Arndt: They knew nothing about the conspiracy, your Honor. We discovered it years afterward.

The Court: The contracts indicate a conspiracy to control the price of beets. It indicates that all the growers in that area received the same price for their beets.

Mr. Arndt: May I give your Honor this example? Suppose that all of the dealers in a given manufactured product—say all second-hand car dealers in California got together and they said or agreed not to pay more than X dollars for such and such a car and Y dollars for this car and Z dollars for that car; and they agreed that if they sell they would only sell them at certain prices.

[Rep. Tr. p. '8, lines 1 to 25]:

Mr. Jones wants to sell his car. He either has to sell it to one of these dealers or he can't sell it at all. Is he a co-conspirator? And are these beet growers that have no other place to sell except to one of these three people conspirators? They are helpless.

The Court: They are not helpless because they entered into this agreement before they planted their beets. In other words, they entered into an agreement whereby the seed was to be furnished and specified the terms of the sale. They recognized that north of the 36th parallel they were to receive the current market price. In substance what that means is the current market price that the other refineries in that area paid.

Now, they knew when they signed that agreement that they were going to receive the average price that the other refineries received. Now, why aren't they co-conspirators? That is just a question that occurred to

me when reading that agreement. In reading the agreement it certainly makes the court feel that there was in fact an agreement between the sugar refineries of that area to pay a certain price for the beets. And it is also clear that the beet growers agreed to accept such a price. Now, why aren't they a part of it?

Mr. Arndt: I refer your Honor to the Bausch & Lomb Optical Company case, 321 U. S. 707. In that case, your Honor, the Bausch & Lomb Company made [Rep. Tr. p. 9, lines 1 to 25]:

the individual dealers in each state agree they would only sell under certain conditions and they either had to sell under those conditions or they couldn't get the lenses. Well, the individual dealers were not guilty of any conspiracy.

The Court: You have a different situation there. There is nothing here to indicate there wasn't free competition as far as the sale of this sugar was concerned. Any suppression of competition was suppression between the three refineries in the amount that they would pay the beet growers.

The beet growers depended upon their product, a root product, a bulb, and shipped them to the refinery, the refinery processed them and passed the finished product into the stream of interstate commerce.

Now, if the plaintiffs in this case were not a party to the agreement the sugar refineries could not have operated.

Mr. Arndt: Let me give you another example.

The Court: Just a moment. I have not followed that thought through nor attempted to. I just thought I would call counsel's attention to it because it was rather intriguing to me. I have thought about it over the week-

end and it just occurred to me that they were all parties to it. There is only one refinery named as a defendant, when as a matter of fact all three of them should have [Rep. Tr. p. 10, lines 1 to 25]:
been joined as defendants.

Mr. Arndt: I have cases on that.

The Court: They were all co-conspirators and each liable if they had been named as defendants. You could have brought them all in just as easily as you could have brought one. I have brought up the question as to whether or not these beet growers are parties to the conspiracy to give you something to think about. I am just throwing that out to you as a thought and if it becomes necessary I will be glad to have you gentlemen spend your time briefing it. I have spent all the time I could on the question, and even before I left for the North and since returning, and to me it was a very interesting and intriguing proposition.

Mr. Arndt: May I be heard briefly on the two points your Honor raises?

The Court: Certainly.

Mr. Arndt: Let us take the grocery case. The exact argument was made there involving the wholesale grocers association operating in Southern California and Northern California. The exact argument was made as is here being presented by your Honor.

There they said the retail grocers only sold here locally—only sold in California; that the product they sold was sold by them at retail to the ultimate consumer.

[Rep. Tr. p. 11, lines 1 to 25]:

There was nothing sold in interstate commerce but the Circuit Court held you cannot separate, you cannot take

an isolated portion of an industry. The particular groceries came to these grocery men through interstate commerce and because it came to them through interstate commerce the sale of the groceries to the ultimate consumer was in interstate commerce. They said you could not isolate one item and not consider the others.

I cannot see how you can possibly reconcile that decision with the thoughts that your Honor has given us here, because the difference between the raisin growers case and this is a very simple one.

Here the contract provides that the sale is not consummated until the product is sold, the raw sugar is sold, and the raw sugar is sold in interstate commerce. Therefore, the activities in interstate commerce are a part of the very contract itself. Until the sale is made in interstate commerce we don't know what the grower is going to get, so to say we can separate—we can throw out of the contract the portion that provides for the price, is to take a part of the contract away that is an essential part of the contract.

We have alleged in our complaint that prior to 1939 the method of sale—how it was done. And we have alleged that they joined together to change this method of [Rep. Tr. p. 12, lines 1 to 25]:
sale.

Now, the various other cases that we have cited from the United States Supreme Court are all recent cases, and they all say that you cannot take one part of a transaction and separate it and say that because one act was done in interstate commerce—we have cited case after case, your Honor, in which that very argument was made as is being made here, that you could isolate one part

of it and say that is not interstate commerce, because in each one of these cases you could isolate some transaction.

The court there said it couldn't be done and here is the vice of what has happened here. Prior to 1940—prior to 1939 the three companies competed in interstate commerce as to their sales organization. Each tried to make the most efficient sales, each tried to produce most efficiently for interstate commerce, but after the conspiracy and as a part thereof they ceased to compete with each other. They were not interested any more in competing as to the efficiency of their sales organization or anything else because they had this plan and conspiracy.

Interstate commerce was much more directly affected in this case than it was in the wholesale grocers case. In the wholesale grocers case there was only an indirect connection. Here there is a contractual connection with interstate commerce as provided by the very contract [Rep. Tr. p. 13, lines 1 to 25]:
itself.

Now, as to the second point your Honor raised. I don't see how that is practical because we have a second count here which does state a cause of action.

The Court: I have been talking about the big issue in this case.

Mr. Arndt: But how can there be an appeal until the second count is determined? There can't be an appeal from an order on one count only.

The Court: I think it was Justice McKenna who said in effect:

"To carry your argument to its natural conclusion the Anti-Trust Act would cover everything."

Mr. Arndt: And that is what the Supreme Court has done.

The Court: It hasn't, as I view it, in light of the opinion in *Parker vs. Brown*.

While that was not an anti-trust case, it held that it hadn't entered into the stream of interstate commerce and therefore the state had jurisdiction.

I think it was Justice McKenna who said:

"There must be a point of time when they cease to be governed exclusively by the domestic law, and begin to be governed and protected by the national law of commercial regulation, and that moment [Rep. Tr. p. 14, lines 1 to 25]:

seems to us to be a legitimate one for this purpose, in which they commence their final movement for transportation from the state of their origin to that of their destination. When the products of the farm or the forest are collected, and brought in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports; nor are they in process of exportation; nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state. Until then it is reasonable to regard them as not only within the state of their origin, but as a part of the general mass of property of that state, subject to its jurisdiction, and liable to taxation there, if not taxed by reason of there being intended for exportation, but taxed, without any discrimination, in

the usual way and manner in which such property is taxed in the state."

Mr. Arndt: That is correct, your Honor, but here we have on contract that provides that the purchase price is [Rep. Tr. p. 15, lines 1 to 25]: determined by sales in interstate commerce.

The Court: But not of that sugar. It is of that season's sugar, as I understand it. I don't know anything about the sugar business and perhaps I will have an opportunity to learn something along those lines before we are through with this case. But as I understand it, they pay them not for the sugar received from those particular beets or the sale of that sugar, but rather from the current price of sugar.

Mr. Arndt: That is not exactly correct, your Honor.

Mr. Whyte: That is one of the points at issue under the contract as I understand your contention.

Mr. Arndt: The contracts prior to 1939 provided that the price to be paid was the price to be paid for sugar manufactured by the particular processor.

Mr. Whyte: That isn't the way I read this contract.

Mr. Arndt: That is how it was prior to 1939. Then since 1939 it was the sugar manufactured in California, north of the 36th parallel—not the proceeds from any other sugar, but the proceeds from the sugar manufactured during that particular year. I want to read from the document—

Mr. Whyte: Sugar grown north of the 36th parallel and sold during the year?

Mr. Arndt: I will read from the first one—that is [Rep. Tr. p. 16, lines 1 to 25]:
the first one here:

"The price per ton shall be determined upon the average net returns received for sugar manufactured at beet sugar factories located in California north of the 36th parallel."

That is 1939. That is the first one.

Mr. Whyte: Exhibit A, your Honor.

The Court: What paragraph are you reading from?

Mr. Arndt: 5.

The Court: "The price per ton for beets delivered hereunder to the company shall be determined upon the average net returns (said net returns being defined in Paragraph No. 6 hereof) received for sugar manufactured at beet sugar factories located in California north of the 36th parallel, and sold during the period of 12 months commencing August 1, 1939, and based upon the company's test of sugar content of the individual grower's beets in accordance with the following schedule:"

Mr. Arndt: Yes, but the point I am making is that sugar manufactured in beet sugar factories located in California north of that parallel during the year.

The Court: Let me ask this question as a matter of general information. These beets are processed in the refineries and following that is the sugar immediately put [Rep. Tr. p. 17, lines 1 to 25]:
on the market?

Mr. Whyte: There is some lag, I suppose, according to supply and demand.

Mr. Arndt: In some years it is immediately sold and some years there is a carry-over. Right now there is a shortage and it is sold immediately.

In 1939, '40 and '41 there was an overproduction and it was not immediately sold. It is as counsel says, a question of supply and demand whether sold immediately or not sold immediately. As a matter of fact, I think the cause of our present lack of supply of sugar is due to these contracts.

Mr. Whyte: I don't suppose I have to answer such a remark as that.

The Court: Another case that I was interested in is 260 U. S. 245. I don't know whether this case was cited by either counsel. There is certain language in the case that I would like to read:

"We may, therefore, disregard any adventitious considerations referred to and their confusion, and by doing so we can estimate the contention made. It is that the products of a State that have, or are destined to have, a market in other states, are subjects of interstate commerce, though they have not moved from the place of their production or preparation. [Rep. Tr. p. 18, lines 1 to 25]:
tion.

"The reach and consequences of the contention repel its acceptance. If the possibility, or indeed, certainty of exportation of a product or article from a state determines it to be in interstate commerce before the commencement of its movement from the state, it would seem to follow that it is in such commerce from the instant of its growth or production, and in the case of coals, as they lie in the ground.

The result would be curious. It would nationalize all industries, it would nationalize and withdraw from state jurisdiction and deliver to federal commercial control the fruits of California and the South, the wheat of the West and its meats, the cotton of the South, the shoes of Massachusetts and the woolen industries of other states at the very inception of their production or growth, that is, the fruits unpicked, the cotton and wheat ungathered, hides and flesh of cattle yet 'on the hoof,' wool yet unshorn, and coal yet unmined, because they are in varying percentages destined for and surely to be exported to states other than those of their production."

Mr. Whyte: And in our case you might say "seed as yet unplanted."

[Rep. Tr. p. 19, lines 1 to 25]:

Mr. Arndt: But how can that be reconciled with the recent decision?

The Court: Gentlemen, if you can reconcile the decisions on this question you are more fortunate than I am. All I can do is follow what I consider to be the trend of these decisions. But I do not feel that it is my function to extend the rules as I now understand them. I feel that if they are to be expanded that is the function of the courts that have the final interpretation of these sections. I do not feel it is my function to legislate.

Mr. Whyte: Your Honor, under any theory there must be some allegation of facts and this complaint is absolutely barren of any allegation of fact—

The Court: You are not going to argue against me, are you?

Mr. Whyte: No, sir; I am trying to supplement your Honor's remarks to satisfy counsel here.

Mr. Arndt: May I read from some of these decisions again?

The Court: Well, I have read your cases, counsel, and I have probably given more time to this case, particularly on a motion to dismiss, than I have on any other case for a long time.

In the first place it was a new subject to me and it [Rep. Tr. p. 20, lines 1 to 25]:

was interesting. There is such a thing as convincing myself to the contrary, but at this time I am convinced that these beet growers are not entitled to protection under the Anti-Trust Act. I may be wrong. It won't be the first time I have been wrong, and it will probably not be the last time either. But I do feel that the pleadings without pleading the contracts and with this particular language in there, makes it difficult to dismiss in view of the general language used and the liability of pleadings under the Federal Rules of Civil Procedure.

Mr. Whyte: Doesn't your Honor have discretion to grant the motion with leave to amend?

The Court: I have had this rather frank, informal discussion with counsel to let them know what I have been thinking. I don't know how you gentlemen could approach the subject other than for me to sit here and listen. I was in hopes that counsel would see fit to amend the first cause of action so that we could get a definite ruling because if we try it and then I should rule as I do now you would be unable to prove that the beets went into interstate commerce and after going through all those preliminary steps and building up a record I don't know whether you would be any better off or not.

Mr. Arndt: Then how is it procedurally possible? Suppose I do amend and set forth the contracts? How is

it procedurally possible to have an appeal without a trial?

[Rep. Tr. p. 21, lines 1 to 25]:

I am not going to abandon my second count.

The Court: I am not asking you to abandon anything. I want you to understand I am only trying to be helpful. I want to try to decide this case correctly. At the same time I feel that if these matters could be reached and have a ruling on this question that it would save you both money because if the court rules with you on this first cause of action then the law of the case is going to be established and it would be settled. On the other hand, if we try it and build up a record and the court reverses it and sends it back for re-trial, you would have to go through the same thing again. Now, we might do like we did in one other case we had. We might enter into—I don't know whether any statute of limitation is involved here.

Mr. Arndt: There is, your Honor. The statute will have passed—

The Court: Has it run yet?

Mr. Whyte: That would be four years under Section 343.

Mr. Arndt: The statute has run on the first year. The statute has run on one of the years. In other words, the statute ran August 31st, that is my recollection, as to one count.

The Court: We had a case where that situation arose. Counsel had several causes of action and under a stipulation and by agreement they dismissed their other causes

[Rep. Tr. p. 22, lines 1 to 25]:

of action and each party waived the statute of limitation and consented that a new suit be filed at any time within

six months after a final determination of the case in the Circuit Court.

Oliver Clark and Lyons & Lyons entered into that agreement by stipulation whereby they could divide their cause of action by a stipulation and have a separate cause of action on the other points and try that.

Mr. Whyte: Counsel will be willing to stipulate to the *status quo* as to the date of the file as to any re-filing. I don't know what the date is.

Mr. Arndt: You didn't plead the statute of limitation in the second and third counts, so I assume you don't content it was limited at that time.

Mr. Whyte: That is right. When was this action filed?

The Court: July 30th.

Mr. Whyte: We would be willing to so stipulate.

Mr. Arndt: There would have to be a contract authorized by a Board of Directors of the corporation. I don't think attorneys have a right to—

The Court: If we continue the matter for a week and you gentlemen discuss it you might arrive at some agreement.

Mr. Whyte: We are glad to do that. You might file [Rep. Tr. p. 23, lines 1 to 25]: two lawsuits if you want to and we will protect you on the statute.

The Court: One has already run in the meantime.

Mr. Whyte: I say we will protect him on the statute back to the date when he filed.

The Court: It seems to me there should be a practical way to determine it because the real money involved is in the treble damage action. The rest of it involves an interpretation of the contract. The real thing involves money and that is under Count 1. It is that count that will make the growers feel good if they recover and the refiners feel bad if it goes in that direction.

Mr. Whyte: A lot of money is involved in that count.

The Court: I realize this is not an open and shut proposition. I realize it is a close case. It make be that the court will hold that I am wrong but I don't see why we should spend weeks in trying the case when the court feels it doesn't state a cause of action.

Mr. Arndt: There are certain advantages in what your Honor says and I will endeavor to work out something along that line. I appreciate your Honor's suggestion.

The Court: If it simply goes up on the pleadings it would be a very inexpensive appeal. If it goes up on a record of days and days of transcript it would be very expensive.

[Rep. Tr. p. 24, lines 1 to 25]:

Mr. Whyte: We would be happy to work out something along the line of your Honor's suggestion.

The Court: I would be interested in any authorities you gentlemen might have on the thoughts I have expressed.

Mr. Whyte: Your Honor may rest assured we will explore that subject further.

Mr. Arndt: I would be very much interested in hearing certain judges of the United States discuss the question of the farmer being a conspirator with a sugar company.

The Court: If this were a criminal case, gentlemen, and they were named as defendants they would be held liable as conspirators. It is true the farmer is a little fellow in the picture, but in this case, considering the amount of beets that they sold, they weren't so small. The sales ran into a lot of money and it wasn't a matter of an individual growing beets on a half acre of ground. He was in the business in a big way and your evidence of conspiracy is going to be this contract itself—at least part of it as to establishing a conspiracy, and all the parties that entered into that contract have the appearance to me of being co-conspirators.

Now, it may be that I have gotten (having tried so many conspiracy cases) an obsession on the subject, but they seem to bring everything in but the kitchen sink when they try a conspiracy case. I don't know how a man who sells \$100,000 worth of beets in one year can [Rep. Tr. p. 25, lines 1 to 25]:

say that he was blameless, particularly when he entered into an agreement before the crop was planted. If they had forced him into some agreement before he had his beets growing and forced him to take their own price that would be different.

Mr. Arndt: I can allege that for one year that happened—those are the facts. For one of the years the beet contracts were signed after the beets were planted.

The Court: I want to say that the thing that bothered me most on this question, was the wording of the contract and it represents to me the closest point—the contract providing for the payment out of the sale of sugar, that represents a very, very close question and for a while I felt that the interstate commerce started with the beets and that it was a continuous movement by reason of that contract. However, I have come to a different conclusion.

Mr. Arndt: Without that there would be no case.

The Court: Well, there might have been an oral contract and they might have been paid on that basis.

Mr. Arndt: When I use the word "contract" I mean either oral or written. I mean without that being in the contract. That is what differentiates it from the other cases.

The Court: That is the thing that bothered me for so long before I finally came to a different conclusion. There are two or three cases here that are about as near on all [Rep. Tr. p. 26, lines 1 to 25]:
fours as you can get them.

Mr. Arndt: On both sides.

The Court: Yes, on both sides. And that is what makes a lawsuit. If it was all one-sided you wouldn't be here. There is enough involved to try it out.

I will continue this matter until next Monday, November 19, at ten o'clock, or any other date that is agreeable.

Mr. Arndt: May we fix it for eleven o'clock that day? I have a matter in the Superior Court at 9:30 which

I would like to complete, and if we could meet here at eleven o'clock I would appreciate it.

The Court: Very well, I will take it up at eleven o'clock.

Mr. Arndt: And there will not be any argument at that time.

The Court: I will take it up at eleven o'clock. I have taken longer this morning with my calendar than I am accustomed to, but I wanted to discuss this case with you gentlemen after reading your briefs. I think you can see that I have been interested in the case.

Mr. Whyte: We certainly appreciate your Honor's interest in it.

The Court: I don't know whether that can be said by counsel on the other side.

[Rep. Tr. p. 27, lines 1 to 7]:

Mr. Arndt: I think I made that statement a few moments ago.

Mr. Whyte: Thank you very much, your Honor.

The Court: Very well, we will stand in recess until two o'clock.

(Whereupon, at 12:00 o'clock noon, the above entitled matter was concluded.)

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 18th day of May A. D., 1948.

J. D. AMBROSE,

Official Reporter

SUPREME COURT OF THE UNITED STATES

No. 75.—OCTOBER TERM, 1947.

Mandeville Island Farms, Inc., and
Roscoe C. Zuckerman, Petitioners,
v.
American Crystal Sugar Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 10, 1948.]

MR. JUSTICE RUTLEDGE delivered the opinion of the Court.

The action is for treble damages incurred by virtue of alleged violation of the Sherman Act, §§ 1 and 2. 26 Stat. 209, 38 Stat. 731, 15 U. S. C. §§ 1, 2, 7, 15. The case comes here on certiorari, 331 U. S. 800, from affirmance by the Circuit Court of Appeals, 159 F. 2d 71, of a judgment of the District Court, 64 F. Supp. 265. That judgment dismissed the amended complaint as insufficient to state a cause of action arising under the Act. In this posture of the case, the legal issues are to be determined upon the allegations of the amended complaint.¹

The main question is whether, in the circumstances pleaded, California sugar refiners who sell sugar in interstate commerce may agree among themselves to pay a uniform price for sugar beets grown in California without

¹ The original complaint contained three counts, the first alleging violations of the Sherman Act and the second and third charging breach of contracts made in 1940 and 1941 respectively. In order to expedite decision and review upon the Sherman Act contention, by stipulation the amended complaint was filed setting forth, with an amendment to be noted, see note 5, only the allegations of the Sherman Act count. The stipulation provided for following this course without prejudice to further assertion by petitioners of rights under the two contract counts within a specified period following final determination of the Sherman Act issues.

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incurring liability to the local beetgrowers under the Act. Narrowly the question is whether the refiners' agreement together with the allegations made concerning its effects shows a conspiracy to monopolize and to restrain interstate trade and commerce or one thus affecting only purely local trade and commerce.

The material facts pleaded, which stand admitted as if they had been proved for the purposes of this proceeding, may be summarized as follows: Petitioners' farms are located in northern California, within the area lying north of the thirty-sixth parallel. The only practical market available to beet growers in that area was sale to one of three refiners.² Respondent was one of these. Each season growers contract with one of the refiners to grow beets and to sell their entire crops to the refiner under standard form contracts drawn by it. Since prior to 1939 petitioners have thus contracted with respondent.

The refiners control the supply of sugar beet seed. Both by virtue of this fact and by the terms of the contracts, the farmers are required to buy seed from the refiner. The seed can be planted only on land specifically covered by the contract. Any excess must be returned to the refiner in good order at the end of the planting season.

² It was alleged that the beets, when harvested, are "bulky and semi-perishable and incapable of being transported over long distances or of being stored cheaply or safely for any extended period . . . when ripe, deteriorated rapidly if kept in the ground and not harvested, and it was necessary to harvest them promptly when matured."

There were also allegations that initial outlay, annual upkeep and operating expenses, and time required for erecting and equipping a refinery, were so great that no competition from any new refinery could be expected short of two years at best; that the three refiners had a monopoly in the area of the supply of seeds and of refining; and that no grower in the region could sell beets at a profit except to one of the three refiners.

MANDEVILLE v. CRYSTAL SUGAR CO.

The standard contract gives the refiner the right to supervise the planting, cultivation, irrigation and harvesting of the beets, including the right to ascertain quality during growing and harvesting seasons by sampling and polarizing. Before delivering beets to the company, the farmers must make preliminary preparations for processing them into raw sugar.³ The refiner has the option to reject beets if the contract conditions are not complied with and if the beets are not suitable in its judgment for the manufacture of sugar.

Prior to 1939 the contract fixed the grower's price by a formula combining two variables, a percentage of the refiner's net returns per hundred pounds from sales of sugar and the sugar content of the individual grower's beets determined according to the refiner's test.⁴

Sometime before the 1939 season the three refiners entered into an agreement to pay uniform prices for sugar beets. The mechanics of the price-fixing arrangement were simple. The refiners adopted identical form contracts and began to compute beet prices on the basis of the average net returns of all three rather than the separate returns of the purchasing refiner. Inevitably all would pay the same price for beets of the same quality.

Since the refiners controlled the seed supply and the only practical market for beets grown in northern California, when the new contracts were offered to the farmers, they had the choice of either signing or abandoning sugar beet farming. Petitioners accordingly contracted with

³ These include cutting off the beet tops, trimming the crowns in a specified way, and removing all foreign substances likely to interfere with factory work.

⁴ Net returns from sugar sales were measured by gross sales price less selling expenses directly applicable to sugar. Monthly settlements were made for beets delivered during the preceding month on the estimated net returns of the refiner. But final settlement had to be deferred until the end of the season when net returns could be accurately determined.

respondent under this plan during the 1939, 1940 and 1941 seasons. The plan was discontinued after the 1941 season. Because beet prices were determined for the three seasons with reference to the combined returns of the three refiners, the prices received by petitioners for those seasons were lower than if respondent, the most efficient of the three, had based its prices on its separate returns.

The foregoing allegations set forth the essential features of the contractual arrangements between the refiners and the growers and of the agreement among the refiners themselves. Other allegations were made to complete the showing of violation and injury. They relate specifically to the peculiarly integrated character of the industry, effects of the arrangements upon interstate commerce, and the relation between the violations charged and the injuries suffered by petitioners.

With reference to the industry in general, it was stated that sugar beets were grown during the seasons 1938 to 1942 on large acreages not only in northern California but also in Utah, Colorado, Michigan, Idaho, Illinois and other states. The crops so grown, when harvested, were not "sold in central markets as were potatoes, onions, corn, grain, fruit and berries, but were produced by growers under contract with manufacturers or processors and immediately upon being harvested were delivered to these manufacturers and taken to their beet sugar refineries where the sugar beets were manufactured by an elaborate process into raw sugar by the said manufacturers, who thereafter sold the resulting sugar in interstate commerce." Then follow the allegations summarized above in note 2 concerning the bulky and semiperishable nature of sugar beets, the impossibility of transporting them over long distances or of storing them cheaply or safely, their rapid deterioration when ripe, and the necessity for prompt harvesting and marketing. These allegations must be taken as intended and effective to put the

agreements complained of in the general setting of the industry's unique structure and special mode of operation.

The specific allegation is added that the sugar manufactured by respondent and the other northern California refiners from beets grown in the region "was, during all of said period [1938 to 1942], sold in interstate commerce throughout the United States."

By way of legal as well as ultimate factual conclusions the amended complaint charged that respondent had unlawfully conspired with the other northern California refiners to "monopolize and restrain trade and commerce" among the several states and to unlawfully fix prices to be paid the growers . . . all in violation of the anti-trust laws . . ."; and that each refiner no longer competed against the others as to the price to be paid the growers, but paid the same price on the agreed uniform basis of average net returns.

There were further charges that prior to 1939 the northern California refiners had "competed in interstate commerce with each other as to the performance, ability and efficiency of their manufacturing, sales and executive departments, and each strove to increase sales return and decrease expenses," with the result that for 1938 respondent secured substantially greater "net gross receipts of sales of sugar" than the other refiners. These in turn were reflected in the payment of $29\frac{1}{2}$ to $52\frac{1}{2}$ cents per ton more to petitioners and other growers dealing with respondent than was paid by the other refiners to their growers.

* At this point the words "in sugar and sugar beets" appeared in the original complaint. They were stricken from the amended complaint by petitioner's counsel prior to dismissal of that complaint. Cf. note 1. This change however did not affect numerous other allegations remaining in the amended complaint concerning the combination's restrictive and monopolistic effects upon interstate trade in sugar. See note 6 and text; also note 24 and text Part IV *infra*.

However, for the seasons 1939, 1940 and 1941, under the new uniform contracts and prices, "there was no longer any such competition" Instead it was alleged upon information and belief that, as a result of the alleged conspiracy, respondent did not conduct its interstate operations as carefully and efficiently as previously or "as it would have had said conspiracy not existed." In consequence, respondent received less in sales returns for raw sugar and incurred greater expenses than if competition had been free, and petitioners "did not receive the reasonable value of their sugar beets."

Further charges were that as "a direct, expected and planned result of said conspiracy, the free and natural flow of commerce in interstate trade was intentionally hindered and obstructed," so that instead of the refiners "producing and selling raw sugar in interstate commerce . . . in competition with each other . . . they became illegally associated in a common plan wherein they pooled their receipts and expenses and frustrated the free enterprise system . . ."; all incentive to efficiency, economy and individual enterprise disappeared; and the refiners operated, "in so far as the growers were concerned," as if they were one corporation owning and controlling all factories in the area, but with three completely separated overheads and with none of the efficiency that consolidation into one corporation might bring.*

* Paragraph XIX of the amended complaint summarized petitioners' conclusions as follows: "By reason of the foregoing acts of the defendant and its said conspirators, interstate commerce in sugar was illegally restrained, competition therein was not only substantially lessened but was destroyed, the price of sugar beets was illegally fixed, and an illegal monopoly was established, all in violation of the anti-trust laws of the United States, to the damage of plaintiffs as aforesaid." (Emphasis added.) Cf. notes 5 and 84.

We are not concerned presently with the allegations relating to the injuries and amounts of damages inflicted upon petitioners, except to say that they are sufficient to present those questions for support by proof, if the allegations made to show a cause of action arising under the statute are sufficient for that purpose.

In our judgment the amended complaint states a cause of action arising under the Sherman Act, §§ 1 and 2, and the complaint was improperly dismissed.

I.

Broadly petitioners regard the entire sequence of growing the beets, refining them into sugar and distributing it, under the arrangements set forth, as a chain of events so integrated and taking place in interstate commerce or in such close and intimate connection with it that, for purposes of applying the Sherman Act, the complete sequence is an entirety and no part of it can be segregated from the remainder so as to put it beyond the statute's grasp.

Respondent, on the contrary, broadly severs the phase or phases of growing and selling beets from the later ones of refining them and of marketing the sugar. The initial growing process together with sale of the beets, and it would seem also the intermediate stage of refining, are taken to be "purely local," since all occurred entirely within California; therefore were wholly intrastate

It is not clear whether damages were to be measured by the difference between the prices actually paid and those that would have been paid if based on respondent's separate returns, or by the difference between the prices paid and the prices set by the Secretary of Agriculture, pursuant to the Sugar Act of 1937, 50 Stat. 910, 7 U. S. C. § 1131 (d); see 5 Fed. Reg. 5231. But that is an issue that need not concern us now. Petitioner Mandeville Island Farms prayed judgment for \$315,043.80; petitioner Zuckerman for \$112,192.14.

events; and consequently were beyond the Sherman Act's reach.

Connected with this severance is the assertion that the complaint alleges no monopolistic or restrictive effects upon interstate commerce, but only such effects in the intrastate phases of the industry.

Much stress is laid upon the so-called interruption of the sequence at the refining stage. Prior to the interruption only beets are involved, afterward only sugar. Since the two commodities are different and all that affects the beets takes place in California, including the restraints alleged upon their sale, the trade and commerce in beets is wholly distinct from that in sugar and is entirely local, as are therefore the restraint and monopolization of that trade. Admittedly once the beets are converted into sugar and the sugar starts on its interstate journey to the tables of the nation, interstate commerce becomes involved. But only then is it affected, and nothing occurring before the journey begins or at any rate before the beets become sugar substantially affects or, for purposes of the statute's application, has relevance to that commerce.

Thus sugar together with its interstate sale and transportation is absolutely divorced from sugar beets, their production, sale and delivery to the refiner. Manufacture breaks the relationship and with it all consequences growing out of the restraints for the interstate processes and the purposes of the statute. In other words, since the restraints precede the interstate marketing of the sugar and immediately affect only the local marketing of the beets, they have no restrictive effect upon the trade and commerce in sugar.

This very nearly denies that sugar beets contain sugar. It certainly denies that the price of beets and restrictions upon it have any substantial relation in fact or in legal significance for the statute's purposes to the price of sugar sold interstate, when the restrictions take place within

the confines of a single state and before the interstate marketing process begins.

II.

The broad form of respondent's argument cannot be accepted. It is a reversion to conceptions formerly held but no longer effective to restrict either Congress' power, *Wickard v. Filburn*, 317 U. S. 111, or the scope of the Sherman Act's coverage. The artificial and mechanical separation of "production" and "manufacturing" from "commerce," without regard to their economic continuity, the effects of the former two upon the latter, and the varying methods by which the several processes are organized, related and carried on in different industries or indeed within a single industry, no longer suffices to put either production or manufacturing and refining processes beyond reach of Congress' authority or of the statute.

It is true that the first decision under the Sherman Act applied those mechanical distinctions with substantially nullifying effects for coverage both of the power and of the Act. *United States v. E. C. Knight Co.*, 156 U. S. 1. Like this one, that case involved the refining and interstate distribution of sugar. But because the refining was done wholly within a single state, the case was held to be one involving "primarily" only "production" or "manufacturing," although the vast part of the sugar produced was sold and shipped interstate,* and this was the main

*It has been previously noted here that the Court applied these labels as a heritage from prior decisions under the commerce clause, dealing not as the *Knight* case with an act or acts of Congress, but with the validity of state statutes, *Wickard v. Filburn*, 317 U. S. 111, 121; *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, 543-545, an approach reflecting Marshall's idea of the mutual exclusiveness of state and national power in this area and ignoring the later evolution of different conceptions in *Cooley v. Board of Wardens*, 12 How. 299. See *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408, 412-427.

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end of the enterprise. The interstate distributing phase, however, was regarded as being only "incidentally," "indirectly," or "remotely" involved; and to be "incidental," "indirect," or "remote" was to be, under the prevailing climate, beyond Congress' power to regulate, and hence outside the scope of the Sherman Act. See *Wickard v. Filburn*, *supra*, at 119 *et seq.*

The *Knight* decision made the statute a dead letter for more than a decade and, had its full force remained unmodified, the Act today would be a weak instrument, as would also the power of Congress, to reach evils in all the vast operations of our gigantic national industrial system antecedent to interstate sale and transportation of manufactured products. Indeed, it and succeeding decisions, embracing the same artificially drawn lines, produced a series of consequences for the exercise of national power over industry conducted on a national scale which the evolving nature of our industrialism foredoomed to reversal.*

We do not stop to review again in detail the familiar story of the progression of decision to that end, perhaps not told elsewhere more succinctly or pertinently than

* Compare, e. g., *United States v. E. C. Knight Co.*, 156 U. S. 1, with *Standard Oil Co. v. United States*, 221 U. S. 1, and *United States v. American Tobacco Co.*, 221 U. S. 106; *Hammer v. Dagenhart*, 247 U. S. 251, with *United States v. Darby*, 312 U. S. 100; *Carter v. Carter Coal Co.*, 298 U. S. 238, with *Sunshine Coal Co. v. Adkins*, 310 U. S. 381; *United States v. Chicago, etc., R. Co.*, 282 U. S. 311, and *Railroad Retirement Board v. Alton R. Co.*, 295 U. S. 330, with *United States v. Lowden*, 308 U. S. 225; *Hopkins v. United States*, 171 U. S. 578, with *Stafford v. Wallace*, 258 U. S. 495; *Employers' Liability Cases*, 207 U. S. 463, 498, with *Virginia R. Co. v. Federation*, 300 U. S. 515, 557, and *Weiss v. United States*, 308 U. S. 321; *New York Life Insurance Co. v. Deer Lodge County*, 231 U. S. 495 and authorities cited; with *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, and *Prudential Insurance Co. v. Benjamin*, 328 U. S. 408.

in *Wickard v. Filburn*, *supra*.¹⁰ Suffice it to say that after coming back to life again in the *Northern Securities* case, 193 U. S. 497, for matters of transportation, the Sherman Act received a second rebirth in 1911 with the decisions in *Standard Oil Co. v. United States*, 221 U. S. 1, and *United States v. American Tobacco Co.*, 221 U. S. 106. Cf. *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, 553 *et seq.*

Not thereafter could it be foretold with assurance that application of the labels of "production" and "manufacture," "incidental" and "indirect," would throw protective covering over those processes against the Act's consequences. Very soon also came the *Shreveport Rate Cases*, 234 U. S. 342, again in the field of transportation, but inevitably to add force and scope to the *Standard Oil* and *American Tobacco* rulings that manufacturing companies lay within the reach of the power and of the statute, deriving no immunity for their conduct violative of the prohibitions merely from the fact of engaging in that character of activity.

¹⁰ See particularly the discussion in 317 U. S. at 119-120. See also *Prudential Ins. Co. v. Benjamin*, 328 U. S. 408; *South-Eastern Underwriters Assn. v. United States*, 322 U. S. 533; *Labor Board v. Jones & Laughlin*, 301 U. S. 1; *United States v. Darby*, 312 U. S. 100; *United States v. Wrightwood Dairy Co.*, 315 U. S. 110; Stern, *The Commerce Clause and the National Economy*, 1933-1946, 59 Harv. L. Rev. 645, 888.

The *Filburn* case dealt with the second Agricultural Adjustment Act and the power of Congress to enact it. But, referring to the first Interstate Commerce Act and the Sherman Act, the Court in the *Filburn* case (pp. 121-122) said that those statutes "ushered in new phases of adjudication" requiring a different approach to interpretation of the commerce clause, although "when it first dealt with this new legislation, the Court adhered to its earlier pronouncements, and allowed but little scope to the power of Congress." For the latter statement the *Knight* case was cited as the principal example.

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With extension of the *Shreveport* influence to general application," it was necessary no longer to search for some sharp point or line where interstate commerce ends and intrastate commerce begins, in order to decide whether Congress' commands were effective. For the essence of the affectation doctrine was that the exact location of this line made no difference, if the forbidden effects flowed across it to the injury of interstate commerce or to the hindrance or defeat of congressional policy regarding it.

The formulation of the *Shreveport* doctrine was a great turning point in the construction of the commerce clause, comparable in this respect to the landmark of *Cooley v. Board of Wardens*, 12 How. 299. For, while the latter gave play for state power to work in the field of commerce, the former broke bonds confining Congress' power and made it an effective instrument for fulfilling its purpose. The *Shreveport* doctrine cut Congress loose from the halting labels of "production" and "manufacturing" and gave it rein to reach those processes when they were used to defy its purposes regarding interstate trade and commerce. In doing so the decision substituted judgment as

¹¹ The doctrine encompassed fundamentally not merely an expanding factor in federal power over transportation. It was rather an integer in the sum of power over commerce, of which authority over transportation was but a part. The "affectation" approach was actually a revival of Marshall's "necessary and proper" doctrine, cf. *Wickard v. Filburn*, 317 U. S. 111, 120, 122, but unqualified by his idea of mutual exclusiveness, see note¹⁸. Once applied to transportation and the Interstate Commerce Acts, it was inevitable that the approach would be extended to the productive and industrial phases of the national economy and the statutes regulating them, including the Sherman Act. Time and events were disclosing ever more clearly the impact of their effects upon interstate trade and commerce. And this was posing the same necessity for regulation as in the field of transportation, in order to protect and preserve the national commerce and carry out Congress' policy regarding it.

to practical impeding effects upon that commerce for rubrics concerning its boundaries as the basic criterion of effective congressional action.

The transition, however, was neither smooth nor immediately complete, particularly for applying the Sherman Act. The old ideas persisted in specific applications as late as the 1930's. But after the historic decisions of 1911, and even more following the *Shreveport* decision, a constantly growing number of others rejected the idea that production and manufacturing are "purely local" and hence beyond the Act's compass, simply because those phases of a combination restraining or monopolizing trade were carried on within the confines of a single state or, of course, of several states.¹² The struggle for supremacy between the conflicting approaches was long continued. But more and more until the climax came in the late 1930's, this Court refused to decide those issues of power and coverage merely by asking whether the restraints or monopolistic practices, shown to have the forbidden effects on commerce, took place in a phase or phases of the total economic process which, apart from other phases and from the outlawed effects, occurred only in intrastate activities.¹³

In view of this evolution, the inquiry whether the restraint occurs in one phase or another, interstate or intrastate, of the total economic process is now merely

¹² *United States v. Reading Co.*, 253 U. S. 26; *United States v. Keystone Watch Case Co.*, 218 F. 502; *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 F. 254; *United States v. E. I. Du Pont de Nemours & Co.*, 188 F. 127. See Mr. Justice Holmes dissenting in *Hammer v. Dagenhart*, 247 U. S. 251, 279.

¹³ *Montague & Co. v. Lowry*, 193 U. S. 38; *Swift & Co. v. United States*, 196 U. S. 375; *United States v. Patten*, 226 U. S. 525; *Binderup v. Pathe Exchange*, 263 U. S. 291; *Federal Trade Commission v. Pacific Paper Assn.*, 273 U. S. 52; *Stevens Co. v. Foster & Kleiser Co.*, 311 U. S. 255; *Bigelow v. RKO Radio Pictures*, 327 U. S. 251.

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a preliminary step, except for those situations in which no aspect of or substantial effect upon interstate commerce can be found in the sum of the facts presented.¹⁴ For, given a restraint of the type forbidden by the Act, though arising in the course of intrastate or local activities, and a showing of actual or threatened effect upon interstate commerce, the vital question becomes whether the effect is sufficiently substantial and adverse to Congress' paramount policy declared in the Act's terms to constitute a forbidden consequence. If so, the restraint must fall, and the injuries it inflicts upon others become remediable under the Act's prescribed methods, including the treble damage provision.

The *Shreveport* doctrine did not contemplate that restraints or burdens become or remain immune merely because they take place as events prior to the point in time when interstate commerce begins. Exactly the contrary is comprehended, for it is the effect upon that commerce, not the moment when its cause arises, which the doctrine was fashioned to reach.

Obviously therefore the criteria respondent would have us follow furnish no basis for reaching the result it seeks. Only by returning to the *Knight* approach, and severing the intrastate events relating to the beets, including the price restraints, from the later events relating to the sugar, including its interstate sale, could we conclude

¹⁴ In *United States v. Frankfort Distilleries*, 324 U. S. 293, 297, we said: "It is true that this Court has on occasion determined that local conduct could be insulated from the operation of the Anti-Trust laws on the basis of the purely local aims of a combination, insofar as those aims were not motivated by the purpose of restraining commerce, and where the means used to achieve the purpose did not directly touch upon interstate commerce." The decisions cited were *Industrial Association of San Francisco v. United States*, 268 U. S. 64; *Levering & Garrigues Co. v. Morrin*, 280 U. S. 103; *United Leather Workers v. Herkert & Meisel Trunk Co.*, 265 U. S. 457, cf. *Local 167 v. United States*, 291 U. S. 293, 297, and *United States v. Hutcheson*, 312 U. S. 219.

there were no forbidden restraints or practices touching interstate commerce here. At this late day we are not willing to take that long backward step.

III.

We turn then to consider the questions posed upon the amended complaint that are relevant under the presently controlling criteria. These are whether the allegations disclose a restraint and monopolistic practices of the types outlawed by the Sherman Act; whether, if so, those acts are shown to produce the forbidden effects upon commerce; and whether the effects create injury for which recovery of treble damages by the petitioners is authorized.

It is clear that the agreement is the sort of combination condemned by the Act,¹⁵ even though the price-fixing was by purchasers,¹⁶ and the persons specially injured under the treble damage claim are sellers, not customers or consumers.¹⁷ And even if it is assumed that the final aim of the conspiracy was control of the local sugar beet market, it does not follow that it is outside the scope of the Sherman Act. For monopolization of local business, when achieved by restraining interstate commerce, is condemned by the Act. *Stevens Co. v. Foster & Kleiser*, 311 U. S. 255, 261. And a conspiracy with the ultimate object of fixing local retail prices is within the Act, if the means adopted for its accomplishment reach beyond the boundaries of one state. *United States v. Frankfort Distilleries*, 324 U. S. 293.

¹⁵ *United States v. Frankfort Distilleries*, 324 U. S. 293, and authorities cited.

¹⁶ Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150; *American Tobacco Co. v. United States*, 328 U. S. 781; *United States v. Patten*, 226 U. S. 525; *Swift & Co. v. United States*, 196 U. S. 375. Each case involved outlawed practices by persons who were both purchasers and sellers, and forbidden effects upon sellers as well as purchasers and consumers.

¹⁷ See note 16.

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The statute does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. Nor does it immunize the outlawed acts because they are done by any of these. Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U. S. 150; *American Tobacco Co. v. United States*, 328 U. S. 781. The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated. Cf. *United States v. South-Eastern Underwriters Assn.*, *supra*, at 553.

Nor is the amount of the nation's sugar industry which the California refiners control relevant, so long as control is exercised effectively in the area concerned, *Indiana Farmer's Guide v. Prairie Farmer*, 293 U. S. 268, 279, *United States v. Yellow Cab Co.*, 332 U. S. 218, 225, the conspiracy being shown to affect interstate commerce adversely to Congress' policy. Congress' power to keep the interstate market free of goods produced under conditions inimical to the general welfare, *United States v. Darby*, 312 U. S. 100, 115, may be exercised in individual cases without showing any specific effect upon interstate commerce, *United States v. Walsh*, 331 U. S. 432, 437-438; it is enough that the individual activity when multiplied into a general practice is subject to federal control, *Wickard v. Filburn*, *supra*, or that it contains a threat to the interstate economy that requires preventive regulation, *Consolidated Edison Co. v. Labor Board*, 305 U. S. 197, 221-222.

Moreover, as we said in the *Frankfort Distilleries* case, "... there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states." 324 U. S. 293, 297. That statement is as true of the situation now presented as of the one then before us, although instead of restrain-

ing trade in order to control a local market petitioners control a local market in which they purchase. For this is not a case involving only "a course of conduct wholly within a state"; it is rather one involving "conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states," and in such a case it is not material that the source of the forbidden effects upon that commerce arises in one phase or another of that program.

In view of all this, it is difficult to understand respondent's argument that the complaint does not allege that the conspiracy had any effect on interstate commerce, except on the basis of the discarded criteria discussed in Part II above. The contention ignores specific allegations which we have set forth. But apart from that fact it rests only on a single grounding, which in the circumstances of this case is little, if any, more than a different phrasing of the criteria supplanted by the *Shreveport* approach.

This is that the change undergone in the manufacturing stage when the beets are converted into sugar makes the case different, for the Sherman Act's objects, than it would be if the identical commodity were concerned from the planting stage through the phase of interstate distribution, *e. g.*, if the commodity were wheat, as was true in *Wickard v. Filburn*, *supra*, or raisins purchased by packers, from growers and shipped interstate after packing, *cf. Parker v. Brown*, 317 U. S. 341, 350.

We do not stop to consider specific and varied situations in which a change of form amounting to one in the essential character of the commodity takes place by manufacturing or processing intermediate the stages of producing and disposing of the raw material intrastate and later interstate distribution of the finished product, or the effects, if any, of such a change in particular situa-

tions unlike the one now presented." For mere change in the form of the commodity or even complete change in essential quality by intermediate refining, processing or manufacturing does not defeat application of the statute to practices occurring either during those processes or before they begin, when they have the effects forbidden by the Act." Again, as we have said, the vital thing is the effect on commerce, not the precise point at which the restraint occurs or begins to take effect in a scheme as closely knit as this in all phases of the industry. Hence in this case the mere fact that the price fixing related directly to the beets did not sever or render insubstantial its effect subsequently in the sale of sugar.

Indeed that severance would not necessarily take place if the manufacturing stage had produced a much greater change in commodities than was effected here. But under the facts characterizing this industry's operation and the tightening of controls in this producing area by the new agreements and understandings, there can be no question that their restrictive consequences were projected substantially into the interstate distribution of the sugar, as the amended complaint repeatedly alleges. Indeed they permeated the entire structure of the industry in all its phases, intrastate and interstate.

We deal here, as petitioners say, with an industry tightly interwoven from sale of the seed through all the intermediate stages to and including interstate sale and distribution of the sugar. In the middle of all these processes and dominating all of them stand the refiners. They

¹⁸ Compare *Arkadelphia Milling Co. v. St. Louis Southwestern R. Co.*, 249 U. S. 134, with *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148.

¹⁹ *Swift & Co. v. United States*, 196 U. S. 375; *American Tobacco Co. v. United States*, 328 U. S. 781; *United States v. Aluminum Co. of America*, 148 F. 2d 418.

control the supply and price of seed, the quantity sold and the volume of land planted, the processes of cultivation and harvesting, the quantity of beets purchased and rejected, the refining, and the distribution of sugar both interstate and local.

Some of these controls have been built up by taking advantage of the opportunities afforded by the industry's unique character, both natural and in its general pattern and habits of organization; ²⁰ others by utilizing the key positions these advantages give the refiners to put contractual restraints upon the growers by their separate actions; ²¹ and still greater ones by the refiners' ability, by virtue of their central and dominating place thus achieved, to agree among themselves upon further restrictions.

Even without the uniform price provision and with full competition among the three refiners, their position is a dominating one. The growers' only competitive outlet is the one which exists when the refiners compete among

²⁰ The natural factors include the peculiar nature of the crop in its limitation to a single primary and commercially profitable use, the necessity for immediate and nearby marketing to follow directly upon harvesting, and the well-known fact that sugar beets are grown only in widely scattered regions specially adapted to the crop in soil, climate and availability of water in large quantities during the growing season.

²¹ Resulting in large part from the natural limitations stated in note 20 and the fact that extracting the sugar content from the beets is an elaborate and technical process, is the further important fact that the processing cannot be done by the growers individually or even in small cooperative groups, but requires specialized and large scale business organization, equipment and investment. All these factors and perhaps others combine to make the refining stage of the industry a specialized manufacturing one to be carried on separately from growing, to establish the refiners' key place in the entire industry, and thus to leave the growers completely at the refiners' mercy for the profitable production of beets except as the latter may compete among themselves.

themselves. There is no other market. The farmers' only alternative to dealing with one of the three refiners is to stop growing beets. They can neither plant nor sell except at the refiners' pleasure and on their terms. The refiners thus effectively control the quantity of beets grown, harvested and marketed, and consequently of sugar sold from the area in interstate commerce, even when they compete with each other. They dominate the entire industry. And their dominant position, together with the obstacles created by the necessity for large capital investment and the time required to make it productive, makes outlet through new competition practically impossible. Upon the allegations, it is absolutely so for any single growing season. A tighter or more all-inclusive monopolistic position hardly can be conceived.

When therefore the refiners cease entirely to compete with each other in all stages of the industry prior to marketing the sugar, the last vestige of local competition is removed and with it the only competitive opportunity for the grower to market his product. Moreover it is inconceivable that the monopoly so created will have no effects for the lessening of competition in the later interstate phases of the over-all activity or that the effects in those phases will have no repercussions upon the prior ones, including the price received by the growers.

There were indeed two distinct effects flowing from the agreement for paying uniform growers' prices, one immediately upon the price received by the grower rendering it devoid of all competitive influence in amount; the other, the necessary and inevitable effect of that agreement, in the setting of the industry as a whole, to reduce competition in the interstate distribution of sugar.

The idea that stabilization of prices paid for the only raw material consumed in an industry has no influence toward reducing competition in the distribution of the finished product, in an integrated industry such as this,

is impossible to accept. By their agreement the combination of refiners acquired not only a monopoly of the raw material but also and thereby control of the quantity of sugar manufactured, sold and shipped interstate from the northern California producing area. In substance and roughly, if not precisely, they allocated among themselves the market for California beets substantially upon the basis of quotas competitively established among them at the time the uniform price arrangement was agreed upon. It is hardly likely that any refiner would have entered into an agreement with its only competitors, the effect of which would have been to drive away its growers, or therefore that many of the latter would have good reason to shift their dealings within the closed circle. Thus control of quantity in the interstate market was enhanced.

This effect was further magnified by the fact that the widely scattered location of sugar beet growing regions and their different accessibilities to market²² give the refiners of each region certainly some advantage over growers and refiners in other regions, and undoubtedly large ones over those most distant from the segment of the interstate market served by reason of being nearest to hand.

Finally, the interdependence and inextricable relationship between the interstate and the intrastate effects of the combination and monopoly are shown perhaps most clearly by the provision of the uniform price agreement which ties in the price paid for beets with the price received for sugar. The percentage factor of interstate receipts from sugar which the grower's contract specifies shall enter his price for beets makes that price dependent upon the price of sugar sold interstate. The uniform agreement's effect, when added to this, is to deprive the

²² See note 20.

grower of the advantage of the individual efficiency of the refiner with which he deals, in this case the most efficient of the three, and of the price that refiner receives. It is also to reflect in the grower's price the consequences of the combination's effects for reducing competition among the refiners in the interstate distribution of sugar.

In sum, the restraint and its monopolistic effects were reflected throughout each stage of the industry, permeating its entire structure. This was the necessary and inevitable effect of the agreement among the refiners to pay uniform prices for beets, in the circumstances of this case. Those monopolistic effects not only deprived the beet growers of any competitive opportunity for disposing of their crops by the immediate operation of the uniform price provision; they also tended to increase control over the quantity of sugar sold interstate; and finally by the tie-in provision they interlaced those interstate effects with the price paid for the beets.

These restrictive and monopolistic effects, resulting necessarily from the practices allegedly intended to produce them, fall squarely within the Sherman Act's prohibitions, creating the very injuries they were designed to prevent, both to the public and to private individuals.

It does not matter, contrary to respondent's view, that the growers contracting with the other two refiners may have been benefited, rather than harmed, by the combination's effects, even if that result is assumed to have followed. It is enough that these petitioners have suffered the injuries for which the statutory remedy is afforded. For the test of the legality and immunity of such a combination, in view of the statute's policy, is not that some others than the members of the combination have profited by its operation. It is rather whether the statute's policy has been violated in a manner to produce the general consequences it forbids for the public and

the special consequences for particular individuals essential to the recovery of treble damages. Both types of injury are present in this case, for in addition to the restraints put upon the public interest in the interstate sale of sugar, enhancing the refiner's controls, there are special injuries affecting the petitioners resulting from those effects as well as from the immediate operation of the uniform price arrangement itself.

The fact that that arrangement is the source of both effects cannot be taken to mean that neither is outlawed by the statute, in view of their interdependence and the completely unified and comprehensive nature of the scheme as respects its interstate and intrastate phases. The policy of the Act is competition. It cannot be flouted, as has been done here, by artificial nomenclatural severance of the plan's forbidden effects, any more than by such a segmentation of the integrated industry into legally unrelated phases. Nor can the severance be made in such a case merely by virtue of the fact that a refining or manufacturing process constitutes an intermediate stage in the whole.

To compare an industry so completely interlocked in all its stages, by all-inclusive contract as well as by industrial structure and organization, with one like producing, processing, and marketing fruits, vegetables, corn, or other products, susceptible of various uses and under conditions affording varied outlets for market, both local and interstate, in the raw or refined state, in which neither such a contractual nor such an industrial integration exists, is to ignore the facts of industrial life. So is it also to make conclusive comparisons with other industries in which the manufacturing process requires and has available a greater variety of raw materials for making the finished product, and involves a longer and more extensive process of change, than does extracting the sugar content of beets to make raw sugar.

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We deal with the facts before us. With respect to others which may be significantly different, for purposes of violating the statute's terms and policy, we await another day.²³

IV.

Little more remains to be said concerning the amended complaint. The allegations comprehend all that we have set forth. We do not stop to restate them, leaving their substance at this point for reference to the summary made at the beginning of this opinion.

Respondent has presented its argument as if the amended complaint omitted all reference to restraint or effects upon interstate trade in sugar and confined these allegations to the trade in beets. It is true that at the hearing which followed filing of the amended complaint, petitioners at one point, apparently in response to some intimation from the court, eliminated the words "sugar and sugar beets" from one of the allegations that the refiners had conspired to "monopolize and restrain trade and commerce among the several states"²⁴

²³ It is suggested that *Parker v. Brown*, 317 U. S. 341, is inconsistent with our conclusion here. The Court there held first that the Sherman Act did not apply because the program was sponsored by the State of California. Contrary to the present suggestion, the opinion assumes that the relation between the intrastate and the interstate commerce in raisins was sufficient to justify federal regulation, if the state-sponsored program of prorating had been "organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate." 317 U. S. at 350. The case therefore contains no suggestion, on the facts or on the law, contrary to the result now reached.

²⁴ See note 5. By way of explaining the deletion, the record contains only the statement of the stipulation, cf. note 1, that the amended complaint eliminated "what the Court considered an ambiguity in the [original] complaint." With no further support from the record, it has been assumed that the ambiguity so elided was the reference to

Respondent takes this elision as effective to constitute an express disavowal by petitioners of any charge of restraint of trade in sugar, the only interstate commodity. The amendment did not eliminate or affect numerous other allegations which in effect repeated the charge in various forms and with reference to various specific effects upon interstate as well as local phases of the commerce. Some of these explicitly specified trade or commerce in sugar,²³ others designated the trade affected as interstate, which on the facts could mean only sugar. Moreover, petitioners deny the disavowal, both in intent and in effect. They say the elision was insubstantial, since in

restraint of interstate trade in *sugar* and hence the petitioners in making it stated themselves out of court.

Apart from the fact that the elision did not affect numerous other like allegations, see note 6 and text, the deletion included the specifications of both "sugar and sugar beets." From this the literal inference, if any of the sort could be made, would be that the elision was intended to withdraw all charges of monopoly or restraint of trade, whether in sugar or in beets, and thus to concede there was no case under the Sherman Act, a conclusion obviously at war with the remaining allegations of restraint of trade in both sugar and sugar beets.

But, if any difference between the two could be assumed as having been intended, it is much more likely that the supposed ambiguity deleted arose from the reference to interstate trade in *beets*, since the allegation as a whole referred only to "interstate trade and commerce" and on the facts pleaded the only trade in beets was intrastate (considered apart, as respondent would do, from its relation to and effects upon the trade in sugar).

In any event the case is to be decided upon the sum of the allegations of the amended complaint, not upon conjecture as to why a particular and, we think, immaterial amendment of one allegation was made. Indeed the entire allegation could have been elided without affecting the substance or validity of the remainder of the amended complaint to state a cause of action under the Sherman Act. There was more than enough without it.

²³ *E. g.*, in the allegation quoted in note 6, as well as others set forth in the text preceding that note.

the clause from which it was made the allegation of conspiracy to monopolize and restrain interstate commerce remained, and the only interstate trade was in sugar. We think the amendment, for whatever reason made, was not effective to constitute a disavowal, disclaimer or waiver.

The allegations are comprehensive and, for the greater part specific, concerning both the restraints and their effects. They clearly state a cause of action under the Sherman Act.

The judgment of the Circuit Court of Appeals is reversed, and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

Reversed and remanded.

SUPREME COURT OF THE UNITED STATES

No. 75.—OCTOBER TERM, 1947.

Mandeville Island Farms, Inc. and
Roseoe C. Zuckerman, Petitioners,

v.

American Crystal Sugar Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 10, 1948.]

MR. JUSTICE JACKSON with whom MR. JUSTICE FRANKFURTER joins, dissenting.

It appears to me that the Court's opinion is based on assumptions of fact which the petitioner disclaimed in the court below. These assumptions are permissible inferences from the amended complaint only if we disregard the way in which the amendments came about.

On hearing, the trial judge apparently considered that a cause of action would be stated only if the complaint alleged that the growing contracts affected the price of sugar in interstate commerce. But the contracts accompanying the pleadings indicated that the effects ran in the other direction. The market price of interstate sugar was the base on which the price of beets was to be figured. The latter price was derived from the income which respondent and others received from sugar sold in the open market over the period of a year. The trial judge therefore suggested that the references to restraint of trade in sugar in interstate commerce created an ambiguity in the complaint. Accordingly, the plaintiff, at the suggestion of the court and for the specific purpose of this appeal, filed an amended complaint which completely eliminated the charge that the agreements complained of affected the price of sugar in interstate commerce, and eliminated the two other counts "to enable the Court herein to pass

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upon the sufficiency of the first count and, further, to make possible a speedy and inexpensive review by appeal if the Court held that the first count was insufficient."

¹ The full text of the Stipulation and Order which was executed by counsel for both parties, and by the District Judge, is as follows:

"Whereas, in oral argument on November 13, 1945, on the motion of defendant to dismiss, etc., Hon. Ben Harrison, the United States District Judge before whom said matter was argued, stated from the bench to counsel herein that he felt that the first cause of action, if supplemented by copies of the contracts attached to the defendant's motion to dismiss, would not state facts sufficient to constitute a cause of action, and suggested that it would be a tremendous saving of time and expense if the complaint were amended (a) by setting forth copies of the agreements involved in the first count, (b) by eliminating what the Court considered an ambiguity in the complaint, and (c) by the parties entering into a stipulation to eliminate from the pleadings, for the purpose of the appeal only and without prejudice to the rights of the plaintiffs, the second and third causes of action, so as to enable the Court herein to pass upon the sufficiency of the first count on its merits and, further, to make possible a speedy and inexpensive review by appeal if the Court held that the first count was insufficient;

"Now, Wherefore, the parties stipulate, without plaintiffs' waiving their rights under the second and third counts and without prejudice to any of plaintiffs' rights thereunder, as follows, to-wit:

"1. Plaintiffs will file an amended complaint herein, attaching copies of the forms of contract in use in 1938, 1939, 1940 and 1941, and omitting the second and third counts.

"2. Said omission of the said second and third counts shall be without prejudice to any of the rights of the plaintiffs as to any cause or causes of action included or includible therein by amendment, and shall not be a retraxit or a dismissal with prejudice.

"3. Defendant herein waives, for the period of time hereinafter set forth, any and all statutes of limitations now or hereafter applicable to the second or third causes of action or any matters therein set forth or includible therein by amendment, and waives the defense of laches as to the second and third causes of action or any matters therein set forth or includible therein by amendment.

"4. Plaintiffs may, at any time prior to six months after the decision on appeal as to the sufficiency of the first count has become final, either amend the amended complaint herein by realleging said second

The District Court then held that since no beets whatever moved in interstate commerce and since there was no charge in the amended complaint that the cost or quality of the product which did move in interstate commerce was in any way affected, no cause of action was stated. The appeal was taken and the Circuit Court of Appeals affirmed.

This Court, however, decides the case as though the original complaint as it related to sugar had not only remained unchanged but had been proved by evidence. Despite the deletion from the complaint of the allegation concerning the price of sugar, the Court assumes, without allegation or evidence, that the price of sugar is affected and on that basis builds its thesis that the Sherman Act has been violated. I think in fairness to the litigants and the District Court, the petitioner's case should be disposed of here on the same basis on which it was pleaded to the courts below.

On the proceedings in the courts below, I would affirm the judgment of the District Court.

and third counts or any portion of either, or, at any time during said period, file a separate action or actions setting forth said second and third counts or any portion of either, all with the same force and effect as if said second and third counts were continuously included herein as second and third counts from the date of the commencement of this action.

"5. The waiver of the statute of limitations and of the defense of laches herein set forth, and the stipulation permitting the amendment of the amended complaint or the filing of a separate action or actions hereinabove set forth, shall continue until six months after the determination on appeal as to the sufficiency of the first count has become final."